LATEST LAW REPORT
FOR
ADMINISTRATION
IN
HORTICULTURE DEPARTMENT

Vol-I

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Assistance

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IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

A. P. Sen
Judge
Supreme Court of India

OBSERVATION

Ad hoc appointment—Govt. issue circular for regularation of services—Services of petitioners terminated on expiry of term on basis of embezzlement—In the instant case allegations of serious misconduct against the petitioners and also the adverse entries in the service records of these petitioners were taken into consideration without giving them any opportunity of hearing and without following the procedure provided in Article 311 (2) of the Constitution of India—Orders terminating the services of the petitioners appellants on the gronud that "the posts are no longer required" are made by way of punishment—Held on facts termination was by way of punishment and orders were illegal for non-compliance of Art. 311 (2) of Constitution of India.

OBSERVED BY

A.P. Sen B.C. Ray

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeals Nos, 230 and 231 of 1982, decided on 7-5-1986 between Jarnail Singh and others, etc., Appellants v. State of Punjab and others, Respondents.

TEXT

Ray, J. :- These appeals on special Leave are against the judgement and orders passed by a Division Bench of the High Court of Punjab and Haryana dismissing sumarily the writ applications being Civil Writs Nos. 476 and 484 of 1981 filed by the appellants on the ground that the orders terminating services of the petitioner did not attach any stigma to the service career of any of the appellants-petitioners, but they are made in terms of employment.

2. The appellants were appointed on ad hoc basis as surveyors on various dates between December 1976 to November 1977 through Employment Exchange. The terms of the order of appointment are quoted herein below :-

"The following officials are hereby appointed as Surveyors in the grade of Rs. 140-6-170/8-210/10-300 up to 28-2-1977 or up to the date till the regular candidates are recommended by the Board, whichever is less on ad hoc basis and are posted under the officers mentioned against their names.

Their services can be dispensed with any time without any notice or reason. These candidates will have to produce their concerned certificate to the concerned officers before the submission of the joining report."

3. The Government of Punjab in order to regularise the services of all the ad hoc employees who had completed the minimum period of one year's service on September, 1980 issued a Circular (Annexure 'B') to the effect that the services of the ad hoc employees shall be regularised on certain conditions men-

tioned therein. On being directed by respondent Nos 3 and 4 the petitioner submitted the requisite documents to the authorities concerned for regularisation of their services. The service of the petitioners was, however, terminated with effect from 31-1-81 by the order of the Chief Conservator of Soils, Punjab, Chandigarh, respondent No 2.

4. The crucial question requires to be decided in the instant appeals is whether the impugned order of termination of services of the petitioner can be deemed to be an innocuous order of termination simpliciter according to the terms and conditions of the services without attaching any stigma to any of the petitioners or it is one in substance and in fact an order of termination by way of punishment based on misconduct and made in violation of the procedure prescribed by Article 311 (2) of the Constitution of India. In other words when the order of termination is challenged as casting stigma on the sevice career, the Court can lift the veil in order to find out the real basis of the impugned order even though on the face of it the order in question appears to be innocuous

5. In order to decide this issue, it is necessary to consider firstly the terms and conditions of appointment. The appointments of the petitioners are purely temporary and they have been appointed on ad hoc basis "up to a certain date or up to date till the regular candidate are recommended by the Board, which ever is later." It was also provided therein their services can be dispensed with any time without any notice or reason. The petitioners undoubtedly worked as Surveyors since the date of their appointment which in some cases (is) in December 1976 and in some cases on different dates between November, 1977 till 31st of January, 1981 when their services weer terminated In the order of termination it has been stated that "services of the employees are terminated with effect from 31-1-81 because these posts are no longer repuired". This order was made by the Chief Conservator of soils, Punjab, respondent No. 2.

6. An affidavit has been sworn by Ashok Kumar, the petitioner No. 2, on 18th March 1981 along with an application for stay. In paragraph 3 of the said affidavit it has been specifically stated :–

"(a) That the petitioner No. 1 was accused of a shortage of Rs. 7317.50, voide communication No. 1965 dated 12-11-1979 received from Assistant Soil Conservation Officer, Budlada, District Bhatinda.

(b) That the deponent who is petitioner No. 2 was also accused of shortfall and a First Information Report dated 20-8-1980 (No. 2715) has been lodged against him with Police Station Nahiwala (District Bhatinda) in respect of the same.

(c) That Darshan Singh, the petitioner No. 6, was accused of shortages, Vide communication No. 10351 dated 3-10-1980 received from the Conservator oi Soils, Ferozepur.

(d) That Satnam Raj, petitioner No. 8 was also accused of misappropriations vide communication No. 10360 dt. 3-10-1980.

(e) That Ramesh Singh, petitioner No. 12 was accused of shortages to the tune of Rs. 14,000/- and was informed accordingly by the respondents

(f) That similar allegations were made against the remaining petitioners and they were branded as incompetent and unfit for Government service. Adverse entries were also made in the Annual Reports."

7. In paragraph 4 of the said affidavit it has been further averred that the above facts are true and correct to the knowledge of the deponent. It has also been stated that the petitioners had prayed in the High Court to summon and scrutinize the official records which would have clearly indicated that the impugned orders of termination were based by way of punishment and cast stigma on the petitioners.

8. In the counter-affidavit sworn by C. M. Sethi, Chief Conservator of Soils, Punjab, Chandigarh on behalf of respondents No. 1 to 7 on April 4, 1981 the statements in paragraphs 3, 4 and 5 of the said affidavit have not at all been controverted. In pararaph 4 of the said affidavit it has been stated that annual/half yearly confidential reports were written on the work and conduct of all adhoc employees including the petitioner in the department. it is not correct to say that they learnt of their adverse reports from the return filed in the High Court for the first time.

9. An additional affidavit verified by C. M. Sethi, Chief Conservator of Soils, respondent no. 2 on January 15, 1982 was filed. It has been stated in paragraphs 3, 4 and 5 of the said affidavit :—

"The claim of the petitioner that their record is satisfactory and they have been performing their duties efficiently was denied in connection with their claim for regular appointment only and it was stated strictly in connection with their claim for regular appointment that some of them have adverse record and there are shortages/embezzlements and that the Departmental Selection Committee constituted by the Government did not recommend them as fit for regular appointment, in view of which they cannot be made regular. The petitioners are quoting that information as a ground for termination of their services, out of context, which is not correct and is denied.

The services of the petitioners were terminated on the expiry of existing term of ad hoc appointment and not for the reason due to which they were found to be not fit for regular appointment by the Departmental Selection Committee.

According to the reports of the Field Officers the petitioners Sarvshri Natha Singh, Balbir Singh, Ram Chand, Darshan Singh, Dalbir Singh, Sat Pal, Nirmal Singh and Satnam Raj who had earned adverse reports during the years 1979-80 and up to 9/89 were duly conveyed the adverse entries. It is, therefore, denied that the adverse entries were not conveyed to them."

10. An additional affidavit on behalf of the appellants has been sworn by Swinder Singh, one of the appellants on 8-8-84. In paragraph 4 of the said affidavit it had been averred that the following appellants were not communicated any adverse report :—

(i) Jarnail Singh, Appellant No. 1 in Civil Appeal No. 230/82.

(ii) Ashok Kumar, Appellant No. 2 in Civil Appeal No. 230/82.

(iii) Tajender Singh, Appellant No. 2 in Civil Appeal No. 231/82.

(iv) Nachhattar Singh, Appellant No. 4 in Civil Appeal No. 231/82.

(v) Bagga Singh, Appellant No. 7 in Civil Appeal No. 230/82.

(vi) Ramesh Singh, Appellant No. 12 in Civil Appeal No.230/82.

(vii) Bura Singh, Appellant No. 5 in Civil Appeal No. 231/82.

(vii) Joginder Singh, Appeallant No. 7 in Civil Appeal No. 231/82.

11. It has been stated in paragraph 5 :—

"That the above names of the Appellants who were not communicated any adverse reports are given in view of the fact that the Respondent State has maintained that Appellants were Communicated adverse reports in accordance with the Rules and they were not confirmed in view of these adverse entries in the Confidential Rolls of the Appellants."

12. It has been stated in paragraph 6 of the said affidavit :—

Name of the Appellant	Date of Report	Date of communication of the report
1. Roop Chand	29-1-81	29/30-1-81
2. Nathha Singh	6-10-80	December 1980
3. Dalbir Singh	not known	24-1-1980
4. Darshan Singh	30-10-80	December 1980
5. Satnam Raj	25-10-80	December 1980
6. Nirmal Singh	not known	December 1980
7. Balbir Singh	not known	December 1980
8. Ram Chand Siv	not known	December 1980
9. Savinder Singh	28-1-80	End of January' 81
10. Sakttar Singh	25-10-80 (issued on 3-11-80)	December 1980
11. Partap Singh	27-10-80 (issued on 3-11-80)	December 1980
12. Sat Pal	25-10-80 (issued on 2-1-81)	2-1-1981
13. Tarsem Lal	24-12-80	End of January' 81.

"That, it is however admitted, that the following appellants were actually communicated adverse reports, as late and closer to their date of termination of their services, as is indicated in the table below :—

13. It has been stated in paragraph 7 of the said affiidavit :-

"That the following persons who were recruited around the same time and were taken in service also earned adverse reports and faced charges of embezzlement, but have been retained and regularised in service in preference to the Appellants :-

(1) Gurbux Singh s/o Sohan Singh
(2) Mithoo Ram s/o Muleand Lal
(3) Gurcharan Singh s/o Hazara Singh
(4) Tulsa Singh s/o Surjeet Singh
(5) Vinay Kumar Sawhney
(6) Kabul Singh s/o Tara Singh
(7) Daulat Ram s/o Gala Ram
(8) Chander Prakash s/o Sunder Lal
(9) Nirmal Singh s/o Sohan Singh
(10) Gurbux Singh s/o Geja Singh
(11) Jaswant Singh s/o Chanchal Singh
(12) Ganda Singh s/o Hardit Singh
(13) Boota Singh s/o Anokh Singh
(14) Manmohan Sood s/o Arjun Singh

14. It has been stated in paragraph 8 of the said affidavit :-

"That there were other persons who were recruited later than the Appellants but continued to remain in service to the detriment of the Constitutional rights of the Appellants".

15. It has been stated in paragraph 10 of the said affidavit :—

"That the respondent State framed false cases of embezzlement against some of the appellants and till to date no proceedings have been taken, nor any inquiries instituted against, in regard to those cases."

16. It has been stated in paragraph 13 of the said affidavit :—

"That the Screening Committee was presided over by the Chief Conservator of Soils, Punjab, Chandigarh Shri C.M. Sethi, under whose administrative control the Appellants' Confidential Record was written, and who has filed the Counter-Affidavit on behalf of the Respondents before this Hon'ble Court."

17. In the affidavit verified by Pritam Singh, Chief Conservator of Soils, Punjab, Chandigarh on 22nd November 1984, it has been stated in paragraph 4 that :—

"It is wrong that there were adverse remarks against Sarvshri Jarnail Singh: Romesh Singh and Bura Singh which were required to be communicated to them. In respect of others there were adverse remarks which were communicated through letter mentioned below :-

(1) Sh. Ashok Kumar :— According to the record available adverse remarks were conveyed by the Conservator of Soils, Ferozepur to the Divisional Soil conservation Officer, Bhatinda vide letter No. 11427 dated 28-10-80 for its further

communication to the official concerned

(2) Tejinder Singh :— Adverse remarks were conveyed by the Conservator of Soils, Ferozepur to the Divisional Soil Conservation Officer, Bhatinda vide No. 11429 dated 27-10-80 for further communication to the official concerned.

(3) Nachhatar Singh :— Adverse remarks were conveyed by the Conservator of Soils, Ferozepur to the Divisional Soil Conservation Officer, Bhatinda, vide No. 10355 dated 3-10-80 for further communication to the official concerned.

(4) Joginder Singh :- Adverse remarks were conveyed by the Conservator of Soils, Ferozepur to the Divisional Soil Conservation Officer, Bhatinda vide- No. 11813 dated 4-11-80 for further communication to the official concerend.

(5) Bagga Singh :—Communication reference is not available on record.

The services of the petitioner were terminated on the expiry of existing term of ad hoc appointment and not for the reason due to which they were found to be not fit for regular appointment by the Departmental Selection Committee.”

18. It has further been stated in paragraphs 6 and 7 of the said affidavit.

“That the adverse entries of the period varying from 10/80 to 1/81 have been communicated to them in December, 1980, January, 1981 As this period is nearer to their date of termination of services so they were to be communicated these remarks at that time only.

It is incorrect to the extent that the persons named below earned adverse remarks and had charges of shortages/ embezzlement.

(i) Mithu Ram s/o Mukan Lal
(ii) Gurcharan Singh s/o Hazara Singh
(iii) Kabul Singh s/o Tara Singh
(iv) Daulat Ram s/o Gala Ram
(v) Chander Parkash s/o Sundar Lal
(vi) Gurbux singh s/o Geja Singh
(vii) Jaswant Singh s/o Chanchal Singh
(viii) Ganda Singh s/o Hardit Sinhg
(ix) Boota Singh s/o Anokh Singh
(x) Manmohan Sood s/o Arjun Singh

However, in the case of remaining persons namely Sarvshri (i)Gurbux Singh, s/o Sohan Singh, (ii)Tulsa Singh s/oSurjit Singh, (iii)Nirmal Singh s/o Sohan Singh, (iv)Vinay Kumar s/o Shri Ram, there were adverse remarks against these persons and the Departmental Selection Committee examined their record of service and found them fit for regular appointment. The Departmental Selection Committee was fully competent to select or reject any of the candidates for regular appointment in accordance with the Government instructions on the subjet ”

19. It has also been stated in paragraph 8 of the said affidavit that the Departmental Selection Committee in accordance with the Government instructions as contained in Government Notifi-

cation dated 28-10-1980 considered the cases of all eligible person including the appellants and the persons cited in the list for appointment on regular basis and the appellants were not found fit for appointment on regular basis by the Committee. Thus the appellants were afforded full opportunity to compete and as such no constitutional right of the appellants was infringed.

20. It thus appears on a consideration of the averments made in the affidavits verified on behalf of the petitioners as well as on behalf of the respondents that the impugned order of termination of service of the petitioners had been made on the ground that there were adverse remarks in the service records of the petitioners as well as there were serious allegations of embezzlement of funds against some of the petitioners. It is quite clear that on consideration of all these adverse entries in the service record as well as serious allegations relationg to misconduct, the peritioners were not considered fit by the Departmental Selection Committee to recommend the petitioners for regularisation of their services as Surveyors. The impugned orders of termination of Services of the petitioners are really made by way of punishment and they are not termination simpliciter according to terms of the appointment without any stigma as wrongly stated. It is undisputed that the respondents Nos. 2 and 3 did not follow the mandatory procedure prescribed by Art. 311 (2) of the Constitution in making the purported orders of termination of services of the petitioners on the ground of misconduct and thus there has been a patent violation of the rights of the petitioners as provided in Art 311 (2) of the Constitution. There is no room for any doubt that the impugned orders of termination of services of the petitioners had been made by way of punishment as the allegations of embezzlement of funds as adverse remarks in the service records of these petitioner were the basis and the foundation for not considering the petitioners to be fit for being regularised in their services in accordance the Government Circular dated October 28, 1980. Therefore, it is clear and evident in the context of these facts and circumstances of the case that impugned order of termination though couched in the innocuous terms and conditions of the appointment, yet the impugned orders of termination of services of the petitioners were in fact made by way of punishment being based on the misconduct. There is also no denial of the specitic averments made in the paragraph 8 of the Additional Affidavit sworn by one of the appellants Swinder Singh on August 8, 1984 that persons who were recruited later than the appellants were allowed to continue and to remain in service to the constitutional rights of the appellants. The impugned order of termination was, therefore, also assailed on the ground of discrimination, infringing Arts. 14 and 16 of the Constitution of India.

21. It is vehemently urged on behalf of the respondents that the orders of termination have been made in accordance with the terms of the ad hoc appointment of the petitioners which provided that their services can be terminated at any

time without assigning any reason and as such the impugned orders could not be assailed on the ground of attaching any stigma to the service career of the petitioners. It has also been urged that where the impugned order is per se innocuous and it is made in accordance with the terms of the appointment, the Court should not delve into the circumstances which were taken into consideration by the authorities concerned in making the order. In other words it has been urged that in such cases it is not for the Court to enquire into the basis of the order and to see if the same was in fact made by way of punishment having evil consequences or not.

22 The petitioners are undoubtedly temporary ad hoc employees having no right to the posts they hold. In the case of Parshotam Lal Dhingra v. Union of India, 1958 SCR 828 :(AIR 1958 SC 36) it has been observed by the Court as follows :—

"In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carried with it no evil consequences and so Art. 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art 311 must be complied with ...."

23 In the case of State of Punjab v. Sukh Raj Bahadur,(1968) 3 SCR 234: the following propositions were laid down by this Court while considering the question whether in case of termination of service of a temporary servant or a probationer, Art 311(2) of the Constitution would be affected or not. The propositions are as follows :—

"1. The services or a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Art. 311 of the Constitution.

2 The circumstances preceding or attendant on the order of termination have to be examined in each case the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether was a mere probationer or a temporary servant.

4. An order of termination of service in unexpectionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service does not attract the operation of Art. 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged by Art. 311 i. e, an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article."

24. This decision was conidered by this court in the case of State of Bihar v. Shiva Bhikshuk Misra, (1971) 2 SCR 191 : (AIR 1971 SC 1011) in connection with the reversion of an officiating Subedar Major to his substantive post of Sergeant. In that case the respondent held the substantive post of Sergeant in the Bihar Police Force till July 31, 1946. On August 1, 1946 he was promoted to the higher post of Subedar. In January 1948 he was further promoted to officiate temporarily as Subedar Major. In october 1950, the Commandant of the Bihar Military Police, Muzaffarpur wrote to the Deputy Inspector of Police, Armed Forces suggesting that it should be censured for having assaulted an orderly. Thereafter, the Inspector General of Police reverted the respondent to the post of Sergeant. The said order of reversion was challenged and it was held by this Court that:—

"So far as we are aware no such rigid principle has ever been laid down by this Court that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government Officer it must be held to have been made in the ordinary course of administrative routine and the Court is debarred from looking at all the attendant circumstances to discover whether the order had been made by way of punishment. The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct. It may be that an order which is innocuos on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order."

25. The order of reversion was held to be by way of punishment and as such was set aside.

26. In the case of State of U.P.v. Sughar Singh, (1974) 2 SCR 335 a permanent Head Constable in the U.P. Police Force was appointed as officiating Platoon Commander in the combined cadre of Sub-Inspector, Armed Police and Platoon Commander. He was subsequently reverted to the substantive post of Head Constable in 1968. At the time of reversion he was one among a group of about 200 officers most of whom were junior to him two questions arose, namely whether the order of reversion is attendant with any stigma and secondly whether there has been any discrimination violating Arts. 14 and 16 of the Constitution. It was held so far as reversion is concerned, the order of

reversion did not cast any stigma nor it has any evil consequences as the respondent neither lost his seniority in the substantive rank, nor there has been any forfeiture of his pay or allowances. It was also held that the order was liable to be quashed on the ground of contravention of Arts. 14 and 16 of the Constitution inasmuch as while the respondent had been reverted, his juniors were allowed to retain their present status as Sub-Inspector and they have not been reverted to the substantive post of Head Constable. It was further held that there was no administrative reason for this reversion, so the order was held bad

27. The question whether the order terminating the service of a probationer made according to the terms of appointment can never amount to punishment in the facts and circumstances of the case was considered by a Bench of 7 Judges of this Court in the case of Shamsher Singh v. State of Punjab, (1975) 1 SCR 814. In that case the service of two Judicial Officers who were on probation were terminated by the Government of Punjab on the recommendation of the High Court under R. 7 (3) in Part D of the Punjab Civil Services (Judicial Branch) Rules 1951 as amended. The services of the probationers were terminated without saying anything more in the order of termimation. This was challenged on the ground that though the order on the face of it did not attach any stigma, yet the attendant circumstances wnich led to passing of the order if considered then the orders would amount to have been made by way of punishment violating Art 311 of the Constitution. It has been odserved relying on the observation of this Court in Parshotam Lal Dhingra v. Union of India, (AIR 1958 SC 36) by A N. Ray, C.J. as follows :—

"No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are termimated it can never amount to a punishment in the facts and circumstaaces of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Art, 311 (2) of the Constitution."

28. This decision was followed and relied upon in the case of Anoop Jaiswal v. Govt. of India, (1984) 2 SCR 453 In that case the appellant being selected for appointment in the I.P.S. was undergoing training as a probationer. On a particular day all the trainees arrived late at the place where P. T/Unarmed combat practice was to be conducted, although prior intimation was sent to them in this regard. This delay was censidered as an incident which called for an enquiry. The appellant was considered to be one of the

ring leaders who was responsible for the delay. Explanation was called for from all the probationers. The appellant in his explanation sincerely regretted the lapse while denying the charge of instigating others in reporting late. After receiving the explanations, all the probationers including the appellant were individually interviewed in order to ascretain the facts. On the explanation and interview, but without holding any proper enquiry the Director recommended to the Government of India that the appellant should be discharged from the service. The Government accordingly passed an order of discharge of the appellant on the ground of unsuitability for being a member of the I.P.S This order was challenged in the Writ Petition. It has been held as follows :—

"Where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

29. The order was held to be bad as it was made on the ground of misconduct without affording reasonable opportunity to the appellant to defend himself as provided under Art. 311 (2) of the Constitution.

30. In the case of Nepal Singh v. State of U.P., AIR 1985 SC 84 the service of appellant Nepal Sing, who was employed in temporary capacity as Sub-Inspector of Police, was terminated by an order of Deputy Inspector General of Police, Bareilly Range and the order merely stated that the appellant's services were not required any more and were terminated with one month's pay in lieu of notice This order was challenged on the ground that it amounted to punishment and since no opportunity of hearing, as provided in the Art. 311 (2) of the Constitution, was afforded, the impugned order was liable to be quashed and set aside. It transpired at the time of hearing that a disciplinary proceeding was initiated against the appellant on the ground that he contacted the second marriage during the lifetime of his first wife and this act was done without obtaining prior permission of the Government. This disciplinary proceeding, however, was not proceeded with. Thereafter the Superintendent of Police Shahjahanpur drew up a list to the effect that he was a corrupt officer and he was not straightforward. The impugned order was made thereafter. It was held that where allegations of misconduct were levelled against a Government servant and it was a case where provisions of Art. 311 (2) of the Constitution should apply, it was not open to the competent authority to take the view that holding the enquiry contemplated by that clause would be a bother or a nuisance and that, therefore, it was entitled to avoid to the mandate of that provision and resort to the guise of an ex facie innocuous termination order.

31. In the instant case as we have stated already herein before that though the impugned order was made under the camouflage or cloak of an order of termination simpliciter according to the terms of the employment, yet considering the attendant circumstances which are the basis of the said order of termination, there is no rota of doubt in inferring that the order of termination had been made by way of punishment on the ground of misconduct and adverse entry in service record without affording any reasonable opportunity of hearing to the petitioner whose services are terminated and without complying with the mandatory procedure laid down in Art 311 (2) of the Constitution of india.

32. The position is now well-settled on a conspectus of the decisions referred to hereinbefore that the mere form of the order is not sufficient to hold that the order of termination was innocuous and the order of termination of the services of a probationer or of an ad hoc appointee is a termination simpliciter in accordance with the terms of the appointment without attaching any stigma to the employee concerned. It is the substance of the order i.e. the attending circumstances as well as the basis of the order that have to be taken into consideration. In other words, when an allegation is made by the employee assailing the order of termination as one based on misconduct, though couched in innocuous terms, it is incumbent on the Court to lift the veil and to see the real circumstances as the basis of foundation of the order complained of. In other words, the Court, in such case, will lift the veil and will see whether the order was made on the ground of misconduct, inefficiency or not. In the instant case we have already referred to as well as quoted the relevant portions of the averments made on behalf of the State respondent in their several affidavits alleging serious misconduct against the petitioners and also the adverse entries in the service records of these petitioners, which were taken into consideration by the Departmental Selection Committee without giving them any opportunity of hearing and without following the procedure provided in Art 311 (2) of the Constitution of India, while considering the fitness and suitability of the appellants for the purpose of regularising their services in accordance with the Government Circular made in October, 1980. Thus the impugned orders terminating the services of the appellants on the ground that "the posts are no longer required" are made by way of punishment.

33. It also appears on a consideration of the averments made in paragraphs 7 and 8 of the Additional Affidavit sworn by one of the appellants Swinder Singh on Auguat 8, 1984, which has not been controverted at all by the respondents, that the respondent though terminated the services of the petitioners on the ground that "these posts are no longer required" have retained and reqularised the services of ad hoc employees mentioned in paragraph 7 as well as ad hoc Surveyors who were recruited later in the said post of

Surveyors to the prejudice of the rights of the appellants, thereby violating the salutary principle of equality and non-arbitrariness and want of discrimination and as enshrined in Arts. 14 and 16 of the Constitution of India. It is pertinent to refer here to the decision rendered by this Court in Sughar Singh's case (AIR 1974 SC 423) where it had been held that the order of reversion reverting the respondent from his officiating appointment to the post of permanent Head Constable while retaining 200 other Head Constables who were junior to him in the officiating higher posts of Platoon Commanders was discriminatory and arbitrary being in contravention of the Arts. 14 and 16 of the Constitution.

34. Similar observations have been made in the case of Manager, Govt. Branch Press v. D.B. Belliappa, (1979) 2 SCR 458. It has been held that the protection of Arts. 14 and 16 of the Constitution will be available even to a temporary Government servant if he has been arbitrarily discriminated against and singled out for harsh treatment in preference to his juniors similarly circumstances. In that case the service of Belliappa, a temporary Class IV employee was terminated without assigning any reason although in accordance with the conditons of his service, other employees similarly situated, junior to Belliappa in the said temporary cadre, were retaind. The order of termimation was held to be bad as it offended the equality clause in Arts 14 and 16 of the Constitution.

35. In the instant case, ad hoc services of the appellants have been arbitraily terminated as no longer required while the respondents have retained other Surveyors who are juniors to the appellants. Therefore, on this ground also, the impugned, order of termination of the services of the appellants are illegal and bad being in contravention of the fundamental rights guaranteed under Arts 14 and 16 of the Constitution of India.

36. In the premises aforesaid, the impugned orders of termination of the services of the appellants are liable to be cancelled and set aside. Let appropriate writs of mandamus be issued directing the respondents, not to give effect to the impugned orders of termination of the services of the appellants. Let a writ of certiorari be issued quashing and cancelling the impugned orders of termination of services of the appellants and the appellants be deemed to be in service

37. In the facts and circumstance of the case, the appeals are allowed with costs assessed at Rs. 2,000/-

Appeals allowed

14
Report No. 02 p. 14

A. P. Sen
Judge
Supreme Court of India

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Report No. 95, p,. 01

D.A. Desai
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art. 311 —Promotion to post of Agricultural Inspector-50% quota reserved in favour of clerical staff —Assurance given that final seniority list of clerical staff was prepared and promotion besides ad hoc promotion would be to regular post—Held, statement accorded full justice.

OBSERVED BY

D.A. Desai and
R.B. Misra,
Hon'ble Judges, Supreme Conrt of Iudia.

IN

Special Leave Petns. Nos. 14169, 11928-29 of 1983 & 13549 of 1983 and 137 & 236 of 1984, 13689, 13662 and 14298-99 of 1983, decided on 20-1-1984, between Sheo Dutt Sbarma, Petitioner v. State of U. P. and others, Respondents.

And

Hari Ram and others etc, Petitioners v State of U.P and others, Respondents.

And

Jaismer Singh and another etc., Petitioners v. State of U.P. and others, Respondents.

And

Beldeo Prasad Chaturvedi, Petitioner v. State of U. P. and others, Respondents.

And

Anand Bihari Sharma, Petitioner. v. State of U.P. and others, Respondents.

And

Vijay Prakash and others, Petitioners v. State of U.P. and others, Respondents.

TEXT

Order:—Petitoners in this group of petitons were promotees to the cadre of Marketing Inspectors in the State of U.P. Way back on September 15, 1970, a decision appears to have been taken for recruitment to the cadre of Marketing Inspectors from two sources: (1) 50% of the posts to be filled in by promotion from the-rank of clerical staff and (2) 50% by direct recruitment. For this purpose, it was decided to prepare a statewise seniority list of clerical cadre, which would be the source from which promotion could be made to the cadre of Marketing Inspectors. The respondents used to make the promotions occasionally temporarily and occasionally ad hoc. It also appears that during the procurement season, the strength in the cadre of Marketing Inspectors is required to be augmented for the period of procurement. To Meet the need of temporary nature, ad hoc promotions used to be given, reversion following as a matter of course on the procurement season coming to an end. As large number of Marketing Inspectors were sought to be reverted' number of writ petitions were filed by the Marketing Inspectors who were under a threat of reversion in the Allahabad High Court. Some of them such as petitioners in Civil Misc. Writ No. 6763 of 1983 in the Allahabad High Court succeeded in obtaining interim relief from the vacation Judge and under the sanction of the interim order continued to function as Marketing Inspectors. A Division Bench of the High Court finally disposed of the writ petition at the admission stage observing that the promotions of the petitioners in that case were ad hoc and up to and inclusive of the period August 31, 1983 and therefore. they had no right to the post of Marketing Inspector. The High Court further observed after referring to the counter-affidavit filed on behalf of the State of U. P. that the steps were being taken for preparation of statewise seniority list of clerical staff for the purpose of promotion to the post of Marketing Inspector. The High Court accordingly held that the petitioners have no right to be in the posts of Marketing Inspectors and accordingly dismissed the writ petition.

2. Number of other writ petitions involving the same point were dismissed observing that for the reasons recorded in the judgment in Writ Petition No 6763 of 83, cognate petitions raising the same point may be dismissed.

3. Some other writ petitions filed by Marketing Inspectors claiming identical relief came up before another Division Bench of the same High Court. The Division Bench rejected the writ petitions observing that the petitioner have an alternative remedy for obtaining the same relief by approaching U.P. Public Services Tribunal and therefore, the writ petitions were liale to be dismissed.

4. The petitioners whose writ petitons were dismissed by the High Court for the aforementioned two reasons have filed these special leave petitions.

5. Today when these special leave petitions came up for admission, Mr. Kapil Sibal, learned counsel who appeared for the State of U. P. drew our attention to an order made by a Division Bench of the Allahabad High Court on September 20, 1983 in writ Petition No. 3440 of 1983, the relevant portion of which may be extracted:

"We accordingly direct that so far as appointments on the posts of Marketing Inspectors by promotion from among the clerks are concerned, such of the officiating Marketing Inspectors as are senior most according to the said seniority list as corrected up to date and as could be accommodated within the 50 per cent promotion quota (subject to reservation against promotion posts, in favour of Scheduled Castes and Backward Classes Candidates) shall be allowed to continue as officiating Marketing Inspectors while the rest may be reverted. It is further clarified that so

D.A. Dhsai
Judge
Supreme Court of India

far as the posts of seasonal Marketing Inspectors are concerned which were created only for the period up to the end of August, 1983 we are not directing extension of the term of such posts. The persons who are to be accommodated within the 50 per cent promotion quota as directed above shall be accommodated to the extent possible against regular posts of Marketing Inspectors and not against seasonal posts. This order is being passed in supersession of earlier interim orders passed in this case."

6. Mr. Kapil Sibal sted that the State of U. P. accepts the finding herein recorded that the seniorty list in respect of the clerical cadre dated January 10, 1983 would be treated as the final seniority list and promotion to the post of Marketing Inspector will be made according to the seniority as set out in the seniority list dated January 10, 1983. He made it clear that if any individual claims any error concerning himself in the seniority list on a proper representation being made the same will be examined and the conclusion reached would be given effect. He stated the that State of U.P. will act according to and consistent with the direction made by the Allahabad High Court as extracted hereinabove. He stated that he makes the aforementioned statement on behalf of the State of U.P.

7. The main relief was sought against the State of U.P. The State of U.P. accepts through Mr. Kapil Sibal that the seniority list of the clerical staff dated January 10, 1983 is the final seniority list and would be the basis on which promotion to the post of Marketing Inspector would be made according to the place in the seniority list to fill in 50% of the promotion quota subject, to reservations in favour of Scheduled Castes and Backward Classes candidates according to the rules in force. The promotion would be to the regular post of Marketing Inspector. Ad hoc promotion may be made be as per the seasonal requirement, more especially during the procurement season. However such promotions must be specific in terms with specification of the period during which promotion is given. Such promotions would be outside the quota of 50% to be filled-in by promotion in the regular cadre of Marketing Inspectors. Petitioners shall be adjusted with regard to their promotions as herein indicated. The statement by Mr Kapil Sibal would accord full justice to the petitioners and they cannot claim any more relief in these petitions and therefore, petitions stand disposed of with no order as to costs.

Order accordingly.

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Report No. 24, p. 01

S. Mukharji
Judge
Supreme Court of India.

OBSERVATION

Disciplinary enquiry—Fairness—Vague charges—Enquiry vitiated—Omission to raise objection by delinquent as to vagueness of charges—Department not exonerated from establishing charges—Order of termination of service based on such charges, not sustainable Spl. Appeal No. 74 of 1972D/–7-4-1972 (Raj), Reversed—Constitution of India, Art. 311.

OBSERVED BY

E. S. Venkataramiah and Sabyasachi Mukharji
Hon'ble Judges, Supreme Court of India

IN

Civil Appeal No. 2179 (N) of 1972, decided on **2-5-1986** between Sawai Singh, Appellant v. State of Rajasthan, Respondent.

TEXT

Sabyasachi Mukharji, **J** :—This is an appeal by special leave granted by this Court against the order dated 7th April, 1972 of the High Court of Judicature for Rajasthan, at Jodhpur, in Special Appeal No. 74 of 1972. The High Court of Rajasthan, Jodhpur in the said appeal refused to interfere with the order of the learned single Judge of that High Court. The learned single Judge had dismissed the writ petition of the appellant challenging the order of termination of his services.

2. The appellant was an employee of the Rajasthan Government and was appointed as returning officer to conduct Panchayat elections at Sardi in Panchayat Samiti Ladnun in the district of Nagaur held in the month of December, 1960. At that time, the appellant was working as Superintendent, Sheep & Wool, Nagaur. The election was to take place on 26th December, 1960 and the date for submission of nomination forms was 25th December, 1960. Four persons, namely, Shri Chaturbhuj, Shri Purna Ram, Shri Jiwan Ram and Shri Jiwan Dass filed their nomination forms. The nomination paper filed by Shri Chaturbhuj was alleged to have been found incomplete and it was, therefore, rejected. The nomination paper was said to be defective for the following reasons—

(i) In the opening line the Ward Number was not filled in and the space provided therefor was left blank;

(ii) In the second line out of the words Panch/Sarpanch one of the two was not struck out; so that there was no indication whether the nomination was for the office of Panch or that of Sarpanch.

(iii) In the third line in the blank space again intended to specify the office, the said Chaturbhuj had filled in his own name thus instead of stating that he was proposing himself as candidate for the office of Panch or Sarpanch, it was found that he was proposing himself as Chaturbhuj.

(iv) At the end of sub-paragraph (1) containing a declaration by the candidate as to his qualifications the said Chaturbhuj did not strike off one of the two words Panch/Sarpanch.

3. In view of the above, the nomination paper was rejected. Shri Jiwan Dass and Shri Jiwan Ram withdrew their candidature and Shri Purna Ram was left alone in the field and was, therefore elected to the office of Sarpanch.

4. On the 2nd July, 1985, the Government of Rajasthan informed the appellant that an enquiry was proposed to be held against him on charge which was as follows:

"That the said Shri Sawai Singh, while functioning as District Sheep & Wool Officer, Nagaur, during the year 1960 was appointed as Returning Officer to conduct Panchayat Election at Sardi-in Panchayat Samiti Ladnun in the month of December, 1960. That the said Shri Sawai Singh showed undue favour to one of the contesting candidates Shri Purna Ram. He manipulated the withdrawal of Shri Jeewan Dass a dummy candidate of Shri Chaturbhuj who was contesting candidate against Shri Purna Ram. The said Shri Sawai Singh committed forgery by effecting erasion in the word "Panch" on the nomination paper of Shri Chaturbhuj malafidely and improperly rejected his nomination form"

5 The statement of allegations was also sent along with the forwarding letter and it was mentioned in the said statement as follows:

"4. Shri Sawai Singh manipulated the withdrawal of Shri Jeevan Dass a dummy candidate of Chaturbhuj by cheating.

5. He further committed forgery by effecting erasion in the word 'panch' on the nomination paper of Shri Chaturbhuj and malafidely and improperly rejected the nomination form of Chaturbhuj and thereby acted in furtherance of the prospects of the election of Shri Purna Ram as Sarpanch Sardi."

6. A reply to the said charge-sheet was submitted by the appellant. He denied the charges levelled against him. By an order dated 4th November, 1964, the Government appointed the Additional Commissioner for departmental enquiry, Rajasthan, Jaipur as an Enquiry Officer to hold the enquiry against the appellant. The Enquiry Officer submitted his report on 27th March, 1967. Perusal of the enquiry report makes perfunctory reading-comparing the evidence of Chaturbhuj and the appellant it is difficult to accept on what basis the enquiry officer accepted Chaturbhuj's version. The Enquiry Officer did not discuss the inherent improbabilities of the statements of Chaturbhuj which will be noted later

7. On 3rd October, 1968, the government issued a show-cause notice to the appellant which was as follows :

"According to the report of the Enquiry Officer the charge has been proved to this extent that Shri Sawai Singh with dishonest intention to declare candidate Poornaram uncontested successful Sarpanch made changes in the nomination form of Shri Chaturbhuj which was complete at the time when it was presented and thus made it incomplete and thereafter illegally rejected it The State Government has provisionally accepted the decision. The State Govenment has provisionally taken further decision that Shri Sawai Singh be removed from State Service for the said mistake. Hence Shri Sawai Singh is hereby given an opportunity that if he wants to file a representation against the provisional decision he may present it within 15 days from the date of receipt of this letter to the undersigned."

8. It may be mentioned that what was the dishonest motive except the inference from the rejection of the nomination paper on alleged improper grounds nothing was indicated in the report of the Enquiry Officer.

9. This notice, however, was later on cancelled and a fresh show-cause notice was issued The appellant gave an elaborate reply to the said notice. To complete the narration of events, the government by an order dated 5th April-1971 accept the findings of the Enquiry Officer and directed his removal from service. The appellant filed a writ petition before the High Court. The writ petition was heard by P.N. Singhal, J. as the learned judge than was of the High Court and he by his order dated 31st August, 1971 dismissed the satue summarily.

10. The appellant filed a Special Appeal before the Division Bench. The said appeal was also summarily dismissed on 7th April, 1972. Therefore on refusal of the High Court to grant a oertificate, by special leave, this appeal has come up before us nearly 15 years after the termination of employment.

11. Shri Tapash Chandra Roy, learned advocate for the appellant, urged before us three main submissions, namely, (i) the charges were not clear, (ii) there was no evidence to support the charges and on the contrary (iii) the evidence on record was contrary to the charges made. The charges framed have been noted namely, (i) The appellant showed under favour to one of the candidates Shri Purna Ram. (ii) He manipulated the withdrawal of Jiwan Dass, the dummy candidate of Shri Chaturbhuj who was the contesing candidate against Shri Purna Ram and (iii) Shri Sawai Singh committed forgery by effecting erasion of the word panch on the nomination paper of Thri Chaturbhuj andmala fide rejected his nomination paper. The second charge i. e. the withdrawal of Jiwan Dass can only be understood in the light of the statement of Shri Jiwan Dass. Shri Jiwan Dass stated thus in his evidence which was on the record of the enquiry :

"I withdraw my nomination paper at 3 P. M. I only heard in the evening that the nomination paper of Chaturbhuj had been rejected. I do not know whether symbol was issued to Chaturbhuj or not. My statement was recorded by Collector Ex. P. 11 and also by C. I which is Ex. P. 12 I had withdrawn my nomination paper voluntarily. No one told me that nomination paper of Chaturbhuj had been accepted. and on that basis, I should withdraw my nomination paper. I do not remember whether I had stated in portion A to B of the statement marked Ex. P. 12 that I was told regarding the acceptance of the nomination form of Chdturbhuj. For that reason I had withdrawn my nomination form. I was not present when Chaturbhuj had asked the reason for rejection of his nomination paper. I do not remember whether I had given the statement marked C to D in Ex P. 12 P.A. to (sic) The statement of Ex. P. 11 was taken by the steno of the Collector in the absence of Collector. The steno was drunk at that time. I cannot say what he recorded in my statement. I had not stated as marked A to B and C to D in Ex P. 11. On cross-evamination the Departmental Officer stated that my nomination form was filled by Sohan Singh. I was not dummy candidate"

12. A fair reading of the said statement would give a complete lie to the charge that the appellant manipulated the withdrawal Jiwan Dass. It is clear that the first charge was not clear, in the sense, how the appellant was alleged to have manipulated the withdrawal of Jiwan Dass. It, is difficult for any officer to meet a charge of this nature. The second charge was about committing forgery effecting erasion of the word 'panch' on the nomination paper of Shri Chaturbhuj. This allegation was sought to be proved by the evidence of handwriting expert. The hand-writing expert was not available for cross-examination on the ground that at that time he was dead. But if evidence of hand-writing expert was necessary to prove the guilt of the appellant then it was necessary on the part if the department to adduce evidence to call another hand-writing expert to corroborate their charge.

13. In order to prove the charge against him it was necessary to estadiish that Shri Chaturbhuj had filed nomination being Ex. P. 13 complete in all respects Shri Chturbhuj is the complainant and his evidence on filing of the nomination paper is not only contradictory but also leads one to believe that he had filed an incomplete nomination form. Shri Chaturbhuj in Ex E. H. P 1 (D. E.) stated that his nomination paper was duly filed in by him. This was taken by the Enquiry Officer to mean that the nomination paper was complete in all respects and wrongly rejected Shri Chaturbhuj on 8th July, 1966 was shown the nomination form Ex. P 13 and he admitted that Ex. P. 13 bears his signatures and that he had submitted it for Sarpanch but he had struck off the word 'panch' in the nomination paper. So as to convey his proposal for sarpanch. He also could not say on seeing the nomination

paper that the word 'panch' in the nomination paper marked A.&.B. by the Additional Commissioner, Departmental Enquiry, had been struck off or not. He could not say whether any rubbing or erasion of the word 'panch' had taken place or not. Shri Chaturbhuj had stated that he did not. Shri Chaturduj had stated that he did not remember who had written his nomination paper. There were two persons present at that time. One was his brother Shri Dhar who was not produced in the Departmental Enquiry and the other was Puran Chand Sharma of Ladnun This was an ambiguous and misleading statement. On the other hand, in the evidence of Shri Puran Chand, he said that he had filled up one from for Shri Chaturbhuj for Sarpanchship and identified the same to be Ex P. 13. He stated after a look at Ex P. 13 that the form was filled up by him in his own hand except the signatures which were done by Shri Chaturbhuj himself in his presence. When the form was shown to him. he stated in his examination-in-chief that the name of Shri Chaturbhuj in Ex. P. 13 marked G to H. and J. to J. was in the handwriting of Shri Chaturbhuj himself and also the signatures K. to L were in the handwriting of Shri Chaturbhuj. There were several other contradictions in the said statement of Puran Chand which were mentioned in paragraphs 11 to 13 of the writ petition before the High Court. These were not considered by the High Court.

14. Quite apart from that fact, it, appears to us that the charges were vague and it was difficult to meet the charges fairly by any accused. Eviednce adduced was perfunctory and did not at all bring home the guilt of the accused.

15. Shri B.D. Sharma, learned advocate for the respondent, contended that no allegations have been made before the enquiry officer or before the High Court, that the charges were vague. In fact the appellant had participated in the enquiry. That does not by itself exonerate the department to bring home the charges.

16. It has been observed by this Court in Surath Chander Chakravarty v. State of West Bengal (1971) 3 SCR 1: (AIR 1971 SC 752) that charges involving consequences of termination of service must be specific, though a departmental enquiry is not like a criminal trial as was noted by this Court in the case of State of Andhra Pradesh v. S. Sree Rame Rao (1964) 3SCR 25: and as such there is not such rule that an offence is not established unless it is proved beyond doubt. But a departmental enquiry entailing consequences like loss of job which now-a-days means loss of livelihood, there must be fair play in action, in respect of an order involving adverse or penal consequences against an employee, there must be investigation to the charges consistent with the requirement of the situation in accordance with the principles of natural justice in so far as these are applicable in a particular situation.

17. The application of those principles of natural justice must always be

in conformity with the scheme of the Act and the subject matter of the case It is not possible to lay down any rigid rules as to which principle of natural justice is to be applied. There is no such thing as technical natural justice. The requirements of natural justice depend upon the facts and circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject matter to be dealt with and so on Concept of fair play in action which is the basis of natural justice must depend upon the particular lie between the parties. See K. L. Tripathi v State Bank of India (1984) 1 SCC 43 Rules and practices are constantly developing to ensure fairness in the making of decisions which affect people in their daily lives and livelihood. Without such fairness democratic governments cannot exist. Beyond all rules and procedures that is the sine qua non.

18 Having regard to the consequences with which the delinqent officer was charged and having regard to the nature of charge and the evidence of hand-writing expert and the absenec of opportunity for cross-examination and the conflicting nature of evidence of Chaturbhuj and nature of evidence given by Jiwan Dass we are of the opinion that the report of the enquiry officer finding the appellant guilty should not have been sustained and the government should not have acted upon it. The High Court, in our opinon, with great respect, was in error in not bearing in mind these aspects which have been indicated hereinbefore.

19. In that view of the matter, the order of the High Court cannot be sustained. In the premises, the order and judgment of the High Court are set aside The appeal is allowed. The appellant is entitled to the costs of this appeal. The appellant would also be entitled to his remuneration and salary for all this period. We do not know if during the pendency of this appeal the appellant has superannuated and retired If that is so, he should be in service up to the date of superannuation with the entitlement of pensionary relief. If not, he should be re-instated.

Appeal allowed.

Report No. 99, p. 01

E. S. Venkataramiah
Judge
Supreme Court of India

OBSERVATION

(A) Constitution of India, Arts. 39 (d), 14, 16—Veterinary Assistant Surgeons working in office of Development Commissioner, Delhi–Disparity between their pay scale and pay scale of similar persons in employment of Central Govt and Union Territory of Chandigarh–Claim for equal pay—Claim though prima facie legitimate not dealt with by Court as 4th Pay Commission was to consider very same question

(B) Constitution of India, Article 311—Government employees—Pay structure—Fixation—Matters to be considered by Pay Commission.

OBSERVED BY

E. S. Venkataramiah and
D. P. Madon,
Hon'ble Judges, Supreme Court of India.

IN

Writ Petn. No. 9080 of 1983, decided on 12-4-1984, between Delhi Veterinary Association, Petitioner v. Union of India and others, Respondents.

TEXT

Order :— The Delhi Veterinary Association is the petitioner in the above case. It is an association of veterinary doctors who are residing in the Union Territory of Delhi. By this petition under Article 32 of the Constitution, the petitioner is seeking relief in respect of Veterinary Assistant Surgones working in the office of the Development Commissioner, Delhi Administration, Delhi, who are its members. It is alleged that these Veterinary Assistant Surgeons have been denied the benefit of the principle of 'equal pay for equal work' incorporated in Art. 39 (d) of the Constitution and that there has been violation of their fundamental rights guaranteed under Article 14 and Article 16 of the Constitution because their scale of salary is lower than the pay scale of Veterinary Assistant Surgeons employed by the Union Territory of Chandigarh or by the Central Government in the Indo-Tibetan Border Police (I T. B. P) and in the Border Security Force (B. S. F.). It is also alleged that the Veterinary Assistant Surgeons are persons who have obtained Bachelor's Degree in Veterinary Science and Animal Husbandry (B. V. Sc. &A H.) from colleges of Veterinary Medicine and the minimum qualifications for entering the said course are more or less the same as those prescribed for M. B. B. S or B D. S. Examinations. They would be taught in the colleges of veterinary medicine inter alia subjects like Biochemistry, Pharmacology and Toxicology, Bacteriology, Pa-

E. S. Venkataramiah
Judge
Supreme Court of India

thology, Hygiene, Parasitology, Surgery, Radiology, Clinical & Preventive Medicine, Obstetric, Gynaecology and additionally Animal Husbandry Some of them, it is stated, have also undergone some special courses after their degree. Having regard to the period of study in the college and the subjects taught they claim that they are almost equal to those who have obtained M.B.B.S. and B.D S. Degrees.

2. It is alleged that whereas the Veterinary Assistant Surgeons in the Union Territory of Chandigarh were paid salary in the scale of Rs. 850-1700 on the basis of the pay scale prevailing in the adjoining State of Punjab and the Veterinary Assistant Surgeons in the Union Territories of Arunachal Pradesh and Mizoram were paid in the pay scale of Rs. 550-900, the Veterinary Assistant Surgeons of the Union Territory of Delhi were given pay in the pay scale of Rs. 425-750 from Jan. 1, 1973 and on a representation being made by them, their pay scale was modified to Rs. 550-900 with effect from November 2, 1977 as was being paid in the Union Territories of Arunachal Pradesh and Mizoram with effect from Jan. 1, 1973 even though the Ministry of Agriculture had recommended that their pay scale should be revised to Rs. 650-1200. The petitioner contends that even now the disparity between their pay scale and the pay scale of the Veterinary Assistant Surgeons of the Union Territory of Chandigarh and of I. T. B. P. and B. S. F. which is fixed at Rs. 650-1200 persists. On the basis of the above allegations the petitioner prays that a direction should be issued to the respondents to treat the Veterinary Assistant Surgeons of the Delhi Administration at par with the Veterinary Assistant Surgeons of Chandigarh, I. T. B. P. and B S. F.

3. A counter-affidavit is filed on behalf of the Union Government denying many of the allegations in the petition and in particular the recommendation said to have been made by the Ministry of Agriculture.

4. The Development Commissioner, Delhi has filed a counter-affidavit justifying the impugned pay scale and at the same time he has pleaded that this is a matter which should be allowed to be examined by the Fourth pay Commission. In view of the latter plea, we feel that it is not appropriate to feel with the merits of the claim of the Veterinary Assistant Surgeons of Delhi in the course of this order although we feel that prima facie their grievance appears to be a legitimate one. Since any alteration in their pay scale would involve modification of the pay scales of officers in the higher cadres in the same department and in the corresponding cadres in other departments, the work of refixation of the pay scale should not ordinarily be undertaken by the Court at this stage become the Fourth Pay Commission is required to consider the very same question after taking into consideration all the relevant aspects.

5. In addition to the principle of 'equal pay for equal work', the pay

structure of the employees of the Government should reflect many other social values. Apart from being the dominant employer, the Government is also expected to be a model employer. It has therefore, to follow certain basic principles in fixing the pay scales of various posts and cadres in the Government service. The degree of skill, strain of work, experience involved, training required, responsibility undertaken, mental and physical requirements, disagreeableness of the task, hazard attendant on work and fatigue involved are according to the Third Pay Commission, some of the relevant factors which should be taken into consideration in fixing pay scales. The method of recruitment, the level at which the initial recruitment is made in the hierarchy of service or cadre, minimum educational and technical qualifications prescribed for the post the nature of dealings with the public, avenues of promotion available and horizontal and vertical relativity with other jods in the same service or outside are also relevant factors.

6. At the same time while fixing the pay scales, the paying capacity of the Government, the total financial burden which has to be borne by the general public, the disparity between the incomes of the Government employees and the incomes of those who are not in Government service and the net amount available for Government at the current taxation level, which appears to be very high when compared with other countries in the world, for developmental purposes after paying the salaries and allowances to the Government servants have also to be borne in mind. These are bowever, not exhaustive of the various matters which should be considered while fixing the pay scales There may be many other including geographical considerations.

7. Above all, it should be noted that the work of a pay Commission does not really mean an increase of Rs. 100/- here or recommending an additional allowance of Rs. 50/- there. It does not also mean a mere reduction of the number of pay's cales or an attempt at the reduction of the gap between the highest pay scale and the lowest pay scale. It is a big exercise in gearing up the national economy to secure the highest good to the millions of our contrymen. In an egalitarian society based on planned economy it is imperative that there should be an evolution and implementation of a scientific national policy of incomes, wages and prices would be applicable not merely to Government services but also to the other sectors of the national economy. As for as possible the needs of a family unit have to be borne in mind in fixing the wage scales. The 'needs' are not static. They include adequate nutrition, medical facilities, clothing, housing, education, cultural activities etc. Any provision made while fixing the pay scales for the development of a society of healthy and well educated children irrespective of the economic position of the parents is only an investiment and not just an item of expenditure. In these days of

galloping inflation, care should also be taken to see that what is fixed today as an adequate pay scale does not become inadequate within a short period by providing an automatic mechanism for the modification of the pay scale.

7-A. The duties of a Pay Commission are really onerous. But we have no doubt that the Fourth Pay Commission will keep in view all the relevant considerations, some of which are referred to above, while dealing with the complex problem of determining the equitable pay scales for the vast number of employees of the Central Government and of the Union Territories. We have also no doubt that the Fourth Pay Commission will not just be another Pay Commission as in the past but with lay down sound principles regarding the salary structure of the public services.

8. In the above situation, we do not feel called upon to decide in isolation the question of discrimination raised before us. This is a matter which should be left to be decided by the Government on the basis of the recommendation of the fourth Pay Commission.

9. It was, however, urged that since the Fourth Pay Commission would not be making any recommendation in respect of the period between 1973 and the date on which the new pay scale to be fixed on the recommendation of the Fourth Pay Commission would come into force, the Court should consider whether the Veterinary Assistant rgeons were entitled to any retrospective benefit in respect of the said past period. Having regard to the long delay in approaching this Court after the fixation of their pay scale earlier, we do not propose to grant any relief in respect of that period.

10. The petition is, therefore, dismissed. The petitioner is at liberty to make its representation before the Forth Pay Commission to determine the pay scale of the Veterinary Assistant Surgeons of Delhi. We are sure that the Fourth Pay Commission which is presided over by a former Judge of this Court would consider their representation sympathetically.

Petition dismissed.

A. P. Sen
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art. 136—Special leave petiion—Distribution of sal seeds—Direction for, by High Court—First part of direction held proper.

OBSERVED BY

A. P. Sen and
S. Natarajan,

Hon'ble Judges, Supreme Court of India.

IN

Spl. Leave Petns. Nos. 14636, 15126-27, 15212-14, 15697 and 17314-15 of 1985 decided on 10-4-1986 between M/S. K. N. Oil Industries etc., Petitioners v. Secretary to the Ministry of Forest, Bhopal and others, Respondents

With

State of M.P., Petitioner v. M/s. Sal Udyog (P) Ltd. and others, Respondents.

TEXT

Order :— These Special Leave Petitions are directed against the judgment and order of the Madhya Pradesh High Court dated June 6, 1985 in regard to distribution of sal seeds. The operative part of the judgment of the High Court in paragraph 54 contains a direction to the effect :

"In the light of the discussion above, therefore, these petitions are disposed of with the direction that the allotment which has been maintained by this Court to the new units and the allotment made to the Mandala Unit at the rate of 10,000 tons per year, could not be altered at the concessional rate for 5 years form the beginning and the remaining sal seeds available every year could only be fairly distributed to all the old units on the basis of their capacity and there appears to be no justification for any concessional rate to these units which could only be allotted the quantity available at the market rate as there is no justificatin for any concessional rate to the old units."

2. It would be seen/that the first part of the direction keeps intact the right of the new units viz. Messrs Bastar Oil Mills Industries Limited, Messrs Sal Udyog Limited, Messrs Allied Oil Industries Limited and Messrs Madhya Pradesh Glychem to allotment of sal seeds to the extent of 10,000 tons per year at a concessional rate guaranteed in terms of the contracts entered into by them with the State Government of Madhya Pradesh. But there is obviou-

sly a mistake as to the Period of five years mentioned therein as we shall presently show.

3. The second part of the direction relates to the remaining sal seeds available every year and this, according to the High Court, could only be fairly distributed as between the old units viz. Messrs M.P. Oil Extraction Pvt. Ltd., Messrs K.N. Oil Industries and Messrs General Food Pvt. Ltd. on the basis of their capacity. As regards the distribution of the remaining sal seeds available every year, the High Court has held that there was no justification of any concessional rate of supply of these units which could only be allotted the quantity available at the market rate. There is some controversy as to the basis upon which distribution of sal seeds is to be made to these units i.e. whether upon the basis of their capacity or on the basis of their utilisation.

4. After hearing learned counsel for the parties at considerable able length and having given the mater our anvious consideration, we are satisfied that the High Court was justified in making the first part of the direction as regards the guaranteed supply of 10,000 tons per year of sal seeds to the new units as per the terms of the contract entered into with them by the State Government, and there could be no alteration of the concessional rate as stipulated for in their contracts. The reason for this obvious. The appeals preferred by Messrs M.P. Oil Extraction Pvt. Ltd. and by Messrs K.N. Oil Industries being Civil Appeals Nos. 294-95/81 having been withdrawn on January 5, 1984, the result was that the judgment of the High Court reported in AIR 1982 Madh Pra 1, M.P. Oil Extraction Pvt. Ltd., Raipur v. State of Madhya Pradesh became final. No doubt, the said appeals were withdrawn by the petitioners because they had arrived at a settlement dated November 16, 1983 with the State Government. Admittedly, the aforementioned new units were not parties to the settlement, nor were their representatives present at the meeting held on June 20, 1983 when the terms of the settlement were reached. It is undisputed that the new units had no notice of the aforesaid meeting nor were they apprised that the State Government contemplated any change in the guantity of sal seeds to be supplied or as to the area of supply. The first part of the direction must therefore be upheld, subject to a modification as to the period mentioned therein.

5. There is an obvious error in the judgment of the High Court which has to be rectified. The High Court has throughout proceeded on a wrongful assumption that the new units under the terms of their contracts with the State Government were assured the supply of sal seeds at a concessional rate for a period of five years. This is plainly contrary to the terms of the contract as between the parties. Under Clause 6 of the contract, the State Government had undertaken to supply to them sal seeds at a concessional rate for a period of four years. It is clarified that the first part of the direction which relates to

the guaranteed supply of 10,000 tons per year to the new units at a concessional rate as stipulated in Clause 3 (1) of their contracts with the State Government would be limited to a period of four years. The direction made by the High Court is accordingly modified.

6. It is however urged on behalf of the new units that the term of four years stipulated for by clause 6 was impossible of compliance till this Court lifted the embargo by its order dated May 6, 1982 by directing that the stay orders operative till that date shall be kept in abeyance and that the contracts with the new units be implemented. It is submitted that because of this, supply of sal seeds to the new units could not be effected till the year 1982. This is controverted by learned counsel appearing on behalf of the State Government. We refrain from expressing any opinion on this aspect. The question whether the period of supply at a concessional rate for a period of four years has to be reckoned from the date of the contract as specified in clause 1 thereof or from the date of actual supply, may give rise to a dispute for which these units may take recourse to arbitration as provided for in clause 23 of the agreement.

7. We must then never to the second part of the direction made by the High Court as to the distribution of the remaining sal seeds available every year i. e. the quantity of sal seeds remaining for distribution after the State Government had complied with its contractual obligations of making supply to the new units at 10,000 tons per year. According to the High Court, the remaining quantity of sal seeds available every year could only be fairly distributed among the old units according to their capacity. There is no discussion in the judgment as to how the apportionment has to be made of remaining quantity of sal seeds among the old units. During the course of argument before us, conflicting claims were made as to the basis on which the allotment is to be made. According to learned counsel appearing for Messrs K.N. Oil Industries and Messrs M.P. Oil Extraction Pvt. Ltd., the basis of allotment should not be the capacity but utilisation. The contention to the contrary put forward by learned counsel appearing on behalf of Messrs General Food Pvt. Ltd. is that fair and equitable distribution necessarily implies that the basis of allotment should be according to capacity and not utilisation. He drew our attention to the fact that his clients for want of allotment were per force required to purchase huge quantities of sal seeds from the market at an exorbitant price.

8. We accordingly remit the matter to the High Court for a decision afresh limited to this aspect only i.e. as to the basis for distribution of the remaining quantity of sal seeds available per year as between the old units. The High Court shall reach a decision afresh on the question after affording opportunity to all the parties affected. The parties may amend their pleadings and place such additional material in

support of their respective claims as they may be advised.

9. The Special Leave Petitions are disposed of accordingly. There shall be no order as to costs.

Order accordingly.

Report No. 1 p. 1

V. Khalid
Judge
Supreme Court of India

OBSERVATION

Appointment of those employees who have worked in leave vacancy—One who has worked earlier in leave vacancy has preferential right over another who worked later.

OBSERVED BY

V. Khalid and G. L. Oza.
Hon'ble Judges Supreme Court of India

IN

Civil Appeal No. 1284 of 1973, decided on 25.2.1987 between (Smt.) Mary Oomen Appellant v. The Manager, M.G.M. High School, Kuruppampaddy, Kerala and others, Respondents.

TEXT

Khalid, J.—This appeal by special leave is directed against the judgment dated 18.1.1973, passed by the High Court of Kerala in writ Appeal No. 45 of 1972.

2. This appeal involves the correct interpretation and the scope and affect of R. 51-A of Chapter XIV-A of the Kerala Education Rules. This Rule reads as follows :—

> "51 A. Qualified teachers who are relieved as per Rule 49 or 52 or on account of termination of vacancies shall have preference for appointment to future vacancies in schools under the same Education Agency, provided they have not been appointed in permanent vacancies in schools under any other Educational Agency."

The Rule gives a teacher, discharged for want of vacancy or relieved as per Rule 49 or 52, a right to reappointment when a future vacancy comes into existence. It is usual for managers of schools to appoint teachers to leave vacancies. Sometimes more than teacher get so appointed when there are more than one vacancy. When such vacancies cease to sxist by the permanent incumbent coming back, the temporary appointees go out. When thereafter a permanent vacancy arises, those who had temporary worked in leave vacancies get preference to be appointed to that vacancy. The question in this appeal is whether the Manager who has to appoint a teacher to a permanent vacancy has to go by the rule of "last come first go", to use the usual industrial jargon, in reverse, or whether the Manager has a right to choose between the temporary teachers, ignoring the principle usually accepted that a person who gets a right to a post by virtue of earlier appointment should not be ignored in preference to a person who gets such title later. Before dealing with this case it will be useful to take note of a Note to Rule 51-A which as follows :

> "if there are more than one claimant under this rule the order of preference shall be according to the date of first appointment. If the date of first appointment is the same, then preference shall be decided with reference to age, the older being given the first preference. In making such appointment, due regard should be given to requirement of subject and to the instructions issued by the Director under sub-r. (4) of R. 1 as far as High schools are concerned."

This note gives the correct quideline based on justice and fair play.

3. Now, we will briefly state the facts. The appellant is a B A. B.Ed. degree holder. She is fully qualified to be appointed as a teacher in any Government or aided school in the state of Kerala. She was appointed in a temporary vacancy in the school of the First respondent, from 13-1-1970 to 16-3-1970, in the academic year 1969-70. The appointment has to be approved by the District Educational Officer, the second respondent herein, which was duly done. Since the vacancy in which the petitioner was working ceased to exist, she went out of the job on 16-3-1970. A further vacancy arose on 22-8-1970 and it continued till 17-12-1970. She worked in this vacancy also. She went out of service when this vacancy ceased. Respondent No. 4 is another teacher who worked in the same school in another leave vacancy, from 1-9-1970 to 26-11-1970. The appellant thus had a total service of six months and one day while the 4th respondent had 2 months and 25 days of service, under the 1st respondent.

4. A permanent vacancy arose in the school for the academic year 1971 72, for Social Studies when the Head Master in that school retired. The appellant made a representation to the Manager for being appointed against that vacancy. The 1st respondent appointed the 4th respondent. The appellant is a Social Studies teacher. The thereupon complained to the second respondent. The second respondent found the appointment of the 4th respondent irregulor and held that that legitimate claimant for the permanent post was the appellant. On this finding he did not approve the appointment of the 4th respondent. The management took the matter in appeal before the Regional Deputy Director of public Instruction, respondent No. 3, who by his order dated 9-11-1971, allowed the appeal. Aggrieved by this order the appellant moved the High Court of Kerala by filing original petition No. 5064 of 1971, challenging the validity of the order passed by the 3rd respondent, inter alia, contending that as per R 51-A of chapter XIV (A) of the Kerala Education Rules, she had a preferential claim and that the appointment of the 4th

respondent was illegal.

5. The learned single Judge dismissed the original petition by his Judgment dated 1-2-1972, on the short ground that R. 51A conferred a right on the appellent for appointment in the future vacancies in the school and it did not restrict the right of the management to make his own choice among the thrown out teachers. The appellant pursued the matter by filing Writ Appeal 45 of 1972. The Division Bench dismissed the appeal agreeing with the learned single Judge that the manageement had a discretion to choose among the thrown out teachers. Hence this appeal by special leave.

6. Though long years have passed by since this dispute arose wherefore we would have normally declined interference with the judgment under appeal, we think it necessary to lay down the law correctly to avoid injustice in cases like this and to prevent abuse of power by those in whom right is conferred under R. 51A. Now, both the appellant and 4th respondent are working in the same school. Though the subject to be taught by the appellant and the 4th respondent figured at one stage as an additionl plea before the learned single Judge, it is inconsequential for this judgement, though the learned single Judge held in favour of the apellant on the question of the subject.

7. Let us read the rule in question. This rule speaks of qualified teachers. Both the appellant and the 4th respondent satisfy this requirement. It speaks of teachers being relieved as per R. 49 or R. 52 or on account of termination of vacancies R 49 speaks of termination of teachers after vacation, when the vacancy in which they work extend over summer vacation and R. 52 speaks of teachers relieved on account of reduction in the number of posts under orders of the department. We are not concerned With these rules. Here, both the teachers were relieved on account of termiation of vacancies. The Rule states, that such teachers shall have preference for appointment to future vacancies in schoals under the same Edncational Agency. A future vacancy has arisen. The school where appointment is sought is under the same Educational Agency. The proviso is not material in this case. All the conditions for application of this Rule are satisfied. The only question that has to be answered is whether a teacher who had worked in a vacancy earlier has a preferential right over a teacher who worked later in the same school. It is true that the rule does not, in terms, mandate that the one who worked earlier should be preferred to the one who worked later. But would it be in accord with justice and fair play, to prefer the who worked later to the one who worked earler in the absence of anything in the Rule giving to the management a right to choose between the two, on the ground of suitability merit or efficiency. The judgment of the Division Bench under appeal was delivered on 18-1-1973. The note quoted above was inserted on 4-7-1972. The note leaves no doubt as to how Rule 51-A has to be construed. The Rule

states that preference will be given with reference to the date of appointment if the same, age should prevail the elder that due regards should be given to the requirements of subject as far as High Schools are concerned. The Division Bench did not choose to accept the clarification contained in the note. The Learned Judges held against the appellant, on the wording of the Rule that, in terms, it did not provide for any preference between two or more persons and did not consider it Proper to read more into this Rule by considering the Note to R. 5 in the same chapter. Although we do not say that a Note to a Rule has any binding effect, it does indeed have a persuasive force. It cannot be ignored that this Note has come as an appendage to Rs. 51-A for clarificatory purposes though it does not form a part of the Rule. The learned Judges felt that propriety and fairness required a decision in favour of the appellant, when they observed: "It would be proper no doudt to give an earlier appointee preference. But seeing the rule as we ought to see every rule and every section in the Kerala Education Rules and the Kerala Education Act as restrictions or regulations in the matter of the free right of the manager to choose and appoint, it is impossible to read more into the rule."

8 With respect, we feel that the learned Judges were influenced more by the words in the abstract contained in the rule and not with the fairness behind the rule.

9. The learned Judges of the Division Bench had before them another Division Bench Judgment where the identical rule fell for cosideration. The relevant portion of that judgment was extracted by the learned Judges. We also find it useful to extract it here :

"5. Very recently, in writ Appeal No. 44 of 1970, we had occasion to construe R. 51-A. And we then observed that despite its unhappy wording, in particular, the use of the words, "preference for appointment" to mean "rith to appointment", we had little doubt that what the rule meant was that a person discharged for want of vacancy had a right to be appointed in future vacancies, provided, of course, he had not by word or deed given up that right or, we might now and, disqualified himself meanwhile. And we added that the present tense of the words, "are relieved" appearing in the rule was the present tense of logic, not of time, so that, in effect, the rule should be read as if it said "qualified teachers who stand relieved" shall have preference. In that view, it is, no doubt, true that the petitioner's appointments between 1957 and 1961 furnished her with a title to reappointment notwithstanding that they were made before the rule came into force, and it is at least arguable that where no priority in preference is prescribed by the rule, priority should be determined by priority of title. The question, then, is whether the plea of abandonment taken by the 3rd respondent is well founded."

The above observation was got over by the Division Bench with the observation that "it was obiter and are certainly not intended to be conclusive observations in the matter. If so, we would have referred this case to a Full Bench" We would have been happy if the appellate Bench had referred this question to a Full Bench and resolved the controversy since the High Court felt that the appellant's contention carried with it the element of fair play and justice and was at least, to put it mildly, in some measure supported by another Division Bench of the same Court. We agree that the preference in R. 51-A should be based on priarity of title. In this case, we do not have a plea of abandonment or other disqualification

10. The learned counsel for the appellant brought to our notice how this Rule was understood by the Manager of the same school when another vacancy arose earlier. At that time also the present appellant applied to the Manager, seeking appointment in the vacancy consequent on the retirement of a Head Master. The Manager declined the request and sent a reply to the appellant, the relevant portion of which, eloquent in favour of the appellant, reads as follows :

> ‘ Rule 51-A, Chapter XIV-A, K.E. R. lays down that qualified teachers who are relieved on account of termination of vacancies shall have preference for appointments to future vacancies. When two persons apply for a post by virtue of the concession laid down in R. 51-A, it is the natural justice to select the persons who has earlier and longer period of previous service. Hence considering all the aspects of the question, the management has appointed Smt. P.E. Sosamma in the said vacancy."

11. The Manager then understood the rule correctly, but later incorrectly. That is why we said earlier in our judgment that the interpretation given by the High Court to this Rule can result in abuse of this discretionary power with the Manager. If the Government wanted to clothe Manager the power to choose among rival cotenders to a future vacancy, the rule should be suitably amended. The rule as it stands clearly confers priority to the earlier appointee. The appellant, therefore, is entitled to succeed. We set aside the order of the Division Bench under appeal and allow this appeal. The appellant will be entitled to all the benefits as though she was appointed when the vacancy in question arose. We would like to make it clear that this ditection of ours will not enable her to draw salary for the period she had not worked but only other benefits such as seniority, increments, etc. The first respondent will pay costs of the appellant.

Appeal allowed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

R. S. Pathak
Judge
Supreme Court of India

OBSERVATION

(A) Condonation of break in service—Services of temporary teacher in Kendriya Vidyalaya terminated—Fresh appointment given but expressly without benefit of past service—Teacher's performance in subsequent years highly praised—Held, he was entitled to benefit of continuous service notwithstanding term to the contrary in his fresh appointment—Constitution of India, Art. 311. (para 5)

(B) Appointment on temporary post—Graduate teacher in Kendriya Vidyalaya Sangathan—Termination of service after three years—Petitioner represented to authorities requesting condonation of break in service—Commissioner of Sangathan, communicated that question of condonation could be considered after 3 years—Writ petition challenging break in service filed after Govt. rejected his request for condonation of break—Petition does not suffer from laches—Constitution of India, Art. 226. (para 4).

OBSERVED BY

R.S. Pathak, R.B. Misra
And. G.L. Oza
Hon'ble Judges Supreme Court of India

IN

Civil appeal No. 1760 of 1986, decided on 6.5.1986 between Sushil Kumar Yadunath Jha, Appellant v. Union of India and another, Respondents.

TEXT

Pathak, J.-This appeal is directed against the order dated January 24, 1985 of the High Court of Delhi dismissing the appellant's writ petition on the ground of laches.

2. Having regard to the circumstances in which the writ petition was filed at the time when it was, the High Court, in our opinion, should have ignored the delay, and considered the matter on its merits.

3. The appellant was appointed on June 29, 1965 to the post of Post-Graduate Teacher in Hindi in a Central Schools Unit under the Ministry of Education, Government of India. The Central Schools Unit was converted into an autonomous body under the Ministry of Education and was described now as the Kendriya Vidyalaya Sangathan. The appellant was appointed on probation for a period of one year. It was stipulated that even after the probation was satisfactorily completed the services of the appellant could be terminated at any time without any reason being assigned on one month's notice

or one month's pay and allowances in lieu of notice. Although the appointment was to a temporary post, it was mentioned specifically that the Schools were of a permanent nature and therefore, it was unlikely that the employee's services would be terminated if his work and conduct was satisfactory. The appellant appears to have done well during the period of probation and his services were continued after the expiry of that period on June 29, 1966. He continued in that post for about three years. During that period he was posted at the Central School No. 2, Holiday Camp, Colaba, Bombay. Thereafter he was sent to raise another School, the Kendriya Vidyalaya Vallabh Vidhya Nagar, Sardar Patel University, Anand (Gujarat). Subsequently he was posted at the Kendriya Vidyalaya, Lonavala According to the appellant, his work was greatly appreciated at each of his postings and he earned two increments during that period. On February 29, 1968, however, his appointment was terminated suddenly. The appellant made a representation against the termination of his services on March 8, 1986 and a few days later he was informed that an appointment letter was following A fresh appointment with effect from June 24, 1968 was made and the appellant was specifically intimated that no benefit of the previous service rendered by him in the Kendriya Vidyalaya Sangathan would be admissible. The appellant was posted to the Kendriya Vidyalaya, Tambaram, Madras and thereafter to the Kendriya Vidyalaya, Srinagar. The appellant seems to have been rather distraught about the break in service between March 3, 1968, when his services were actually terminated and June 24, 1968 when he entered upon his fresh appointment and requested the authorities that the break in service be condoned. The request was turned down and it was intimated that his personal behaviour during his early stint of appointment was found open to objection. The appellant, however, earned goodwill and high praise during subsequent years for the conscientious and dedicated work consistently put in by him. Successive and repeated communications were sent by his immediate superiors to the authorities detailing the high order of achievement shown by the appellant in his work and pressing that a lenient view be taken in regard to condoning the break in his service. He had been informed by the then Commissioner of the Kendriya Vidyalaya Sangathan that on the completion of three years of service his case could be reconsidered for condoning the break in service. In the hope that the assurance would be honoured the appellant persistently requested that the continuity of his service may be maintained. The record before us sufficiently establishes that his work was marked by outstanding efficiency and devotion and that almost everywhere that he was posted he was not found lacking in dedication to his responsibilities. During his posting in the Kendriya Vidyalaya Central School in Kabul, the Indian Ambassador, it appears was so impressed by his work that in February 1983 he examined his case and found that the earlier termination of service had proceeded out of some personal misunderstanding, and that there was every reason for removing the break in service The Government, however, expressed its helplessness in accepting the request on the ground that the existing Rules did not permit it It was thereafter that the appellant, after obtaining permission to institute proceedings, filed a writ petition in the High Court.

4. It is apparent that the appellant made detailed representations from one level to another hoping that on the strength of his record the authorities would accede to his request for condoning the break in his service. There is equally no doubt that he was supported throughout by his immediate superiors because of the high order of the work preformed by him in his various postings It was only when the Government itself turned down his request that he considered it proper to turn to a Court of law for redress. Upon the peculiar facts of this case we find it difficult to hold that the appellant was guilty of laches in restoring to the judicial process for relief. We think the High Court erred in rejecting the writ petition on that ground.

5. We have examined the record before us and have heard learned counsel for the parties We do think that the respondents should have found it possible to accede to the request of the appellant for condoning the break in his service. There is no doubt that his services were terminated, but the grounds on which they are said to have been terminated have subsequently not been found to be such as to constitute a permanet deterrent to a favourable consideration of the appellant's case. Indeed the Commissioner, as we have noted earlier, had expressd the view that it was a good case for condoning the break in service and indeed those who had occasion to personally witness the quality of the appellant's performance in subsequent years, as for example the Indian Ambassador at Kabul, had thought that in fairness and justice to the appellant his request should be accepted. It is true that his terms on which he was appointed afresh expressly stated that he would not be entitled to continuity of service, but we must have regard to the circumstance in which he accepted those terms. He was in on position to bargain for a better deal and in the straitened circumstances in which he found himself he was compelled to accept whatever was dictated to him. We do not for a moment suggest that the sanctity of the contract between the parties should be given a go-bye, but what we do find is that here is a case where the subsequent conduct and the quality of his permance, of which high appreciation was recorded by his superiors, indicated that he should be relieved of the disadvantage suffered by him pursuant to that term in his contract of fresh appointment. Having regard to the interests of justice and in all the circumstances of this case we are of opinion that the appellant is entitled to an order, condoning the break in his service and holding that he should be considered as continuing in service throughout from the date of his original

appointment. We order accordingly.

6. The appellant will be entitled to all the benefits flowing from such continuity of serivce. It has not been shown in the counter-affidavit filed by the respondents that the seniority of any other teacher will be affected by allowing him consequential benefits. In the circumstances we see no reason to abridge the scope of those consequential benefits.

7. The appeal is allowed, the order dated January 24, 1985 of the High Court is set aside and the respondents are directed to condone the break in service of the appellant and treat him as in continous service from June 29, 1965 with all consequential financial and other benefits. The respondents are also directed to pay to the appellant the amount representing such financial benfits for the period ending April 30, 1986 within three months from today. In the circumstance of the case there is no order as to costs.

Appeal allowed.

A.P. Sen
Judge
Supreme Court of India

OBSERVATION

Seniority—Lecturer in college—Appointment on teaching assignment to foreign university—Extraordinary leave granted to him for foreign assignment would not affect break in service so as to deprive him of his seniority in college—U P. State Universities (President's Act Act 10 of 1973), sec. 50 (1).

OBSERVED BY

A.P. Sen and S. Natarajan
Hon'ble Judges Supreme Court of India.

IN

Civil Appeal No 1477 of 1986, decided on 2-5-1986 between Dr K.P. Hajela, Appellant v N S. Verma and others, Respondents.

TEXT

Natarajan, J.—This appeal by special leave is directed against the order of a learned single Judge of the Allahabad High Court in Civil Misc. Writ Petn. No. 3710 of 1985 filed in the High Court by the first respondent herein. The appeal lies within a narrow compass as the limited question for consideration is whether the extraordinary leave granted to the appellant for the period 24-12-1980 to 31-7-1983 on the request of the Government of India for his being posted on a teaching assignment in the Univerrsity of Aden (South Yemen) effected a break in service so as to deprive the appellant of his seniority in the Department of Zoology in the D.A.V. College, Kanpur.

2. The facts, which are not in controversy, of the case, are briefly as set out below.

On 1-9-1949 the appellant was appointed as Lecturer in Zoology in substantive capacity in the D.A.V. College, Kanpur. About six weeks later i.e. on 12-9-1949 (sic) the first respondent was also appointed as a Lecturer in Zoology in the same College. In the year 1974 the appellant was appointed as the Head of the Department of Zoology in the said College. On 24-12-1980 the appellant was granted extraordinary leave on the request of the Government of India for being sent on a teaching assignment to the University of Aden (South Yemen) on the express condition that his lien on the post in the College will be maintained and his seniority will be protected. On the besis of such an arrangement the appellant fulfilled his teaching assignment at the University of Aden and on return to India he sought to resume his post in the College.

The first respondent who was acting as the Head of the Department refused to hand over charge on the ground he had attained seniority over the appellant. It is relevant to mention here that the first respondent did not also continuously serve the College but left its services and went to other teaching instititutions and after stints of service therein, he rejoned the Department of Zoology in the D A.V College, Kanpur. It would appear that the first respondent went over on 21-1-78 as Principal of the D.A. V. College, Dehra Dun and thereafter he went over as Principal of the D.B.S. College, Kanpur and subsequently he came back to the D.A.V. College, Kanpur.

3. As the first respondent refused to hand over charge of the Department, the appellant made a representation to the Principal and sought his intervention After considerable delay the Principal refused to countenance the appellant's claim to seniority and sustained the stand taken by the first respondent.

4. The appellant challenged the order of the principal before the Vice-Chancellor of Kanpur University. While contending that he had not suffered a break in service and his seniority over the first respondent has remained intact all through his period of service on deputation, the appellant further contended that first respondent had in fact suffered break in service because of his spells of service at the D.A.V College, Dehra Dun and the D.B.S. College, Kanpur and as such the first respondent's claim of continuos service was an untenable one. The Vice-Chancellor upheld the appellant's claim that he had not suffered any break in service and by virtue of his lien he was entitled to his rightful place of seniority. Aggrieved by the order of the Vice-Chancellor, the first respondent preferred an appeal to the Chancellor but the Chancellor affirmed the order of the Vice-Chancellor and dismissed the appeal.

5. Thereafter the first respondent filed Civil Misc. Writ Petition No. 3710 of 1985 under Art 226 of the Constitution before the High Court of Allahabad By the impugned order a learned single Judge of the High Court allowed the writ petition holding that in terms of either the Old Statutes or the First Statutes of the Kanpur University the appellant herein is not entitled to reckon the period of service at the University of Aden for computing the length of service in the D A.V. College and as such the recognition of the seniority of the appellant over the first respondent by the Vice-Chancellor and the Chancellor in their respective orders cannot be sustained. Accordingly the learned Judge has issued a rule in favour of the first respondent and it is against that order this appeal by special leave has been filed

6. While presenting the case of the appellant before us Shri S N. Kacker, learned counsel did not press the alternative contention of the appellant that the first respondent had suffered break in service in the D.A.V. College, Kanpur

and as such he has no locus to claim seniority. Consequently, the only ground on which the order of the High Court was assailed is that the High Court was in error in holding that the deputation service of the appellant has effected a break of service and as such he has lost his original seniority in the Department of Zoology. As the High Court has held that neither under the Old Statutes nor under the First Statutes of the Kanpur University the appellant is entitled to tack on his service in the University of Aden with his service in the D.A.V. College, Kanpur it is necesary to advert to the relevant provisions in the two Statutes. However, before such advertence, it will be relevant to refer to the letter of consent issued to the appellant by the then Principal viz. Shri S C. Srivastava of the D.A.V. College, Kanpur as a condition precedent for his accepting the teaching assignment abroad. The letter, addressed to the Ministry of Home Affairs, is worded as under :—

"From
Principal
D.A.V. College,
Kanpur, U.P.
India.

To,

Ministry of Home Affairs,
Department of Personnel and
Administrative Reforms,
(Foreign Assignment Section)
New Delhi.

Assignment of Indian Experts abroad. Certified that the appellant Dr. K. P. Hajela, Head of Zoology Department, D.A.V. College, Kanpur, will be relieved for service abroad on foreign service terms in public interest (i.e. retaining the applicant's lien and protecting his seniority within thirty days of selection if need be). It is further stated that the applicant, Dr. Hajela, can be released for service abroad for a total period of three years.

August 21, 1978. sd/S.C. Srivastava"

It may be seen from this letter that the appellant had been granted leave for a period of three years and a specific undertaking had been given on behalf of the College that the appellant's lien in the College will be retained and his seniority also will be protected during his period of service abroad. It will also be relevant to mention in this context itself that even now the present Principal, who has declined to uphold the seniority of the appellant, has conceded in his order dated September 1, 1983 that the appellant's lien has been maintained. The relevant portion in the order is contained in para 6 and reads as under :

"Dr. Hajela's lien has been maintained on his post here in so far as he was granted extrordinary leave without pay for the period of contract service abroad and that no appointment was made in his place. Other claims are not admissible."

7. No doubt the first respondent and the present Principal of the College have taken the stand that the former Principal had no authority to guarantee

the appellant his lien in the Department and his rank of seniority. The merit of this stand will be gone into later but for the moment we would only like to point out that one part of the undertaking given by the former Principal namely, retention of lien has been conformed to and what is disputed is only the guarantee regarding the protection of seniority.

8. Now coming to the Statutes the relevant one in the old Statutes is 11.34 and the one in the First Statutes is 18.10. They are in the following terms :

Old Statues :

"Seniority of Teachers in Affiliated

Colleges :

11.34 (1) Subject to the provisions of these Statutes the seniority of teachers in a particular college shall be determined by the length of service in that College in the same cadre and in the same grade.

(2) The periods of service in another University or associated/affiliated college in the same or higher cadre and grade shall also count towards seniority if the University or College is situated in Uttar Pradesh and the College is affiliated to or associated with one of the Universities in the State.

(3) Service in an officiating capacity shall not be counted. Temporary service shall be counted only if it is in continuation of a subsequent permanent appointment.

(4) The period of leave without pay shall not be counted in calculating the seniority unless during such leave another position involving similar work was held or it was medical leave."

First Statutes :

"Seniority of Principals and Teachers of affiliated colleges

18.10 The following rules shall be followed in determining the seniority of Principals and other teachers of affiliated colleges :

(a) the Principal shall be deemed senior to other teachers in the College;

(b) the Principal of a post-graduate college shall be deemed senior to the Principal of a Degree College;

(c) the seniority of Principals and teachers of the affiliated colleges shall be determined by the length of continuous service from the date of appointment in substantive capacity;

(d) service in each capacity (for example, as Principal or as a teacher), shall be counted from the date of taking charge pursuant to substantive appointment;

(e) Service in a substantive capacity in another University or another degree or post-graduate college whether affiliated to or associated with the University or another University established by law shall be added to his length of service."

Another provision, which not been adverted to by the High Court, is also set out as it has relevance:

> "18.16 The statutes contained in this Chapter shall not affect the inter (se?) seniority of teachers employed in this University from before the commencement of these statutes."

9. In order to give operative force to the First Statutes over the Old Statutes in the event of any conflict in the provisions of the two Statutes a specific provision has been made in Chapter I Section 50 (1)/1.02 (1) and it is worded as under:—

> "All existing Statutes and all such Ordinances in force in the Univerity, as are inconsistent with these Statutes are to the extent of such inconsistecy, hereby rescinded and shall forthwith cease to have effect except as respects things done or omitted to be done before the commencement of these Statutes."

10. The High Court has taken the view that there is no inconsistency between Statute 11.34 of the Old Statutes and Statute 18.10 of the First Statutes and as such the seniority of the appellant should be determined in accordance with Statute 11.34 (2). As it is provided in sub-clause (2) of Statute 11.34 that the periods of service in another University or College is situated in Uttar Pradesh and the College is affiliated to or associated with one of the Universities in the State, it has been held that the appellant cannot tack the period of his service in the University of Aden with his service in the D.A.V. College for purposes of seniority. The High Court has further held that even if the First Statutes are held applicable the appellant will fare no better because under Sub-clause (e) of Statute 18.10 it is only the service rendered in a substantive capacity in another University or affiliated or associated College in the University or another University established by law that would count. As the University of Aden would not fall within the definition of "University or another Univrsity established by law" envisaged in the sub-clause the High Court has stated that any service rended in a foreign University has to be necessarily excluded whie computing the length of continuous service.

11. On a careful consideration of the matter we find that the High Court has not properly comprehended the Statutes. Taking up Statute 11.34 of the Old Statutes it may be seen that sub-clause (1) deals with reckoning of seniority on the basis of the length of service in one and the same College and in the same cadre and grade; sub-clause (2) provides for the addition of service in another University or associated/affiliated College etc. provided the University is situate in Uttar Pradesh and the College is affiliated to or associated with one of the Universities in the State; sub-clause (3) excludes service in an officiating capacity and grants recognition of temporary service only if it has continu-

ity with a subsequent permanent appointment; and lastly sub-clause (4) prescribes for taking on of leave period with the total length of service provided; (1) the period of leave has been spent in holding another position involving similar work or (2) it was medical leave. Admittedly, the case of the appellant cause his service in the University of Aden will not constitute such kinds of services as are envisaged in the sub-clause. However, sub-clause (4) would undoubtedly, cover the case of the appellant because he had been granted leave of absence on loss of pay for a period of three years for rendering service in the University of Aden on deputaion basis. The words "unless during such leave another position involving similer work was held" would squarely apply to the period of leave of the appellant. It is significant to note that the qualifying words "University or College situated in Uttar Pradesh and the colleges affiliated to or associated with one of the Universities in the State" occurring in sub-clause (2) are conspicusly absent in sub-clause (4) It is not the case of the first respondent and for that matter there can be no such contention also that the position held by the appellant in the University of Aden did not involve the performance of work similar to the one was performing in the D.A V. College, Kanpur. Unfortunately, this sub-clause which is the one directy governing the case of the appellant has not been noticed by the High Court. As there is no conflict between sub-clause (4) of statute 11.34 of the Old Statutes and any provision in the First Statutes there is no room or scope for invoking the overriding provision contained in Statute 1.02 (1) for denying the application of Old Statute 11.34 (4) to the case of the appellant. On the other hand the appellant will be entitled to claim the benefit of First Statute 18.16 (or 18.01-Fd.) which preserves "inter (se?) senioity of teachers employed in the University from before the commencement of the Statutes".

12. The High Court has faild to notice that sub-clause (2) ane (4) of Old Slatute 11.34 contemplate different situations and act in different fields. The service contemplated under sub-cl. (2) is a distinctly different service and has no bearing with the service rendered in the particular institution in which seniority is claimed. Even so, a link is provided between the servies rendered elsewhere and the services rendered in the concerned University or College because of the similarity of features in the two services and the integral connection between the Universities situated in the State and the affiliation or association of the Colleges with one or the other of the Universities in the State. On the other hand the service contemplated under sub-clause (4) is the service rendered elsewhere during leave period even while the teacher continues to be on the rolls of the institution in which he has been rendering service. Thus while sub-clause (4) contemplates

service rendered elsewhere during the period of leave, sub-clause (2) does not contemplate any such service but contemplates the service rendered elsewhere without taking leave from any institution. A proper exposition of the fields of operation of sub-clauses (2) and (4) of Old Statute 11.34 will at once bring to light the merit in the contentions of the appellant and the error that has been committed by the High Court. As we have already stated the provision contained in sub-clause (4) of Old Statuter 11.34 has not been disturbed in any manner by the First Statutes and hence the appellant will be entitled to the benfit of this provision, especially in terms of Statute 18.16 of the First Statutes. Because of the failure of the High Court to have applied the appropriate provision in the Statutes, the period of service of the appellant on deputation has been wrongly held to be non-includible in the total length of service of the appellant and this has led to the denial of the appellant's rightful seniority.

13. As the appellant's case falls squarely within Old Statute 11.34 (4) there is no need or necessity for resorting to the provisions of the first Statutes for determining the appellant's claim of seniority. It is not the case of the appellant that he had rendered service in a substantive capacity in another University or another affiliated or associated College established by law as contemplated by sub-cl. (e) of First Statute 18.10. On the other hand his claim is that he had all along continued to be in the service of the D.A.V. College, Kanpur notwithstanding his service on deputation in a foreign University because he had been granted extraordinary leave on loss of pay with guaranteed lien and seniority of service.

14. It was hesitantly contended by the counsel for the first respondent that the former Principal of the D. A. V. College had no authority to guarantee the appellant the lien on his post and his seniority rights and that such powers vested only with the University This contention does not require examination because the Principal as the Head of the Institute, was undoubtedly competent to grant leave on loss of pay to the appellant in order to enable him to take up a foreign assignment on deputation basis. Once it is probed by the appellant that the period of leave was utilized in holding another position involving similar work the appellant is automatically entitled to the benefit of sub-cl (4) of Old Statute 11.34. On account of this irrefutable position it is needless for us to consider whether the principal had acted within his powers or had exceeded his powers in committing the College to confer rights of lien and seniority status to the appellant when he was granted leave.

15. In the light of our conclusion the appeal has to succeed. Accordingly it will stand allowed and the judgment of the High Court is set aside. The parties will, bear their respective costs.

Appeal Allowed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

ACC No. 4807

R. S. Pathak
Judge
Supreme Court of India.

OBSERVATION

Transfer of principal from one educational institution to another by imploring Sec. 16 G (2) (c) of Education Act after commencement of Services Commission Act—Not permissible—U. P. Secondary Education Services Commission and Selection Boards Act (5 of 1982), Secs. 16 and 32—U. P. Intermediate Education Act (2 of 1921), Sec. 21 G (2)(c)—Regulations under Education Act, Chap. III, Regn 55 to 62.

OBSERVED BY

P. N. Bhagwati,. and R. S. Pathak
Hon'ble Chief Justice and Judge Supreme Court of India.

IN

Civil Appeals Nos. 2072 of 1985 with 2628, 2996 and 4091-92 of 1985 with Spl. Leave Petn (Civil) No 9542 of 1985 decided on 9-5-1986 between :

Om Prakash Rana, Appellant v. Swaup Singh Tomar and others, Respondents.

Uday Pratap Singh, Appellant v. Subedar Singh Chauhan and others, Respondents.

District Inspector of Schools, Appellant v. Raghunandan Prasad Bhatnagar and other, Respondents.

Shashi Pal Singh, Petitioner v. State of U. P. and others, Respondents

TEXT

Pathak, J. :— The principal question in these appeals is whether, in view of the enactment of the U.P. Secondary Education Services Commission and Selection Boards Act, 1982 and the Rules framed thereunder, the provisions contained in S. 16-G (2) (c) of the U P. Intermediate Education Act, 1921 and Regulations 55 to 62 in Chapter III of the Regulations framed under that Act in respect of the transfer of a Principal from one Intermediate College to another continue to be operative and effective.

2. The Intermediate Education Act, 1921 (shortly referred to as 'the Education Act) and the Regulation framed thereunder provide inter alia for the conditions of service of Heads and of the teachers of such educational institutions. The appointment of the Heads and of teachers of educational institutions in the State continued to be governed by the Education Act for several years, but with the passage of time it came to be felt that the selections of teachers under the provisions of that Act and the Regulations were not always

free and fair and moreover the field of selection was greatly restricted. As this adversely affected the availability of suitable teachers and the standards of education the Government of Uttar pradesh Promulgated the U.P. Secondary Education Services Commission and Selection Boards Ordinanse 1981 on July 10, 1981 with a view to establishing a Secondary Education Services Commission and six or more Secondary Education Selection Boards for the selection of teachers in institutions recognised under the Education Act. The Ordinance was replaced subsequently by the enactment of the U.P. Secondary Education Services Commission and Selection Boards Act, 1982 (conveniently referred to as 'the Services Commission Act'). Thereafter the State Government framed Rules for carrying out the purposes of the Act. It was some time before the Services Commission and the Selection Boards could be constituted and therefore a number of Removal of Difficulties Orders were made by the State Government pursuant to power conferred under the aforesaid Ordinance and thereafter under the Commissian Act.

3. We propose to take the appeal filed by Om Prakash Rana against Swarup Singh Tomar (Civil Appeal No. 2072 of 1985) as representative of the factual context in which the appeals arise. The Veer Smarak Intermediate College is an educational institution in Baraut in the district of Meerut. It is an institution recognised under the provisions of the Intermediate Education Act, 1921. On June 30, 1982 the post of Principal of the College fell vacant on the retirement of the outgoing principal, Jai Singh. The Committee of Management resolved that Bhopal Singh, the then Principal of the Adarsh Vedic Intermediate College, situated in the same district, should be invited to join the post of principal in the College. It was intended that the vacancy should be filled in accordance with the provisions of the Education Act and the Regulations made thereunder which permitted the tranfer of a principal from one institution to another. As the transfer could be effected only with the approval of the District Inspector of Schools, an application was made to the District Inspector of Schools. He refused to grant approval. On July 13, 1982 the District Inspector of Schools directed the Committee of Management to give charge of the post of Principal to the respondent Swarup Singh Tomar as officiating Principal. Three days later, the District Inspector of Schools superseded that order and directed that the respondent Swarup Singh Tomar should be appointed ad hoc principal under the Removal of Difficulties order issued order the Services Commission Act. The Committee of Management of the College filed a writ petition in the Allahabad High Court against the order of the District Inspector of Schools, and during its pendency the High Court. made an interim order in which it was recognised that Swarup Singh Tomar was functioning already as ad hoc principal of the institution. About this time, the appellant Om Prakash Rana,

who was Principal of the B. P. Intermediate College at Bijwara in the district of Meerut, requested the Committee of management of his College to relieve him in order to enable his transfer as Principal to the Veer Smarak Intermediate College. On Novemder 22, 1982 the Committee of management passed a resolution accordingly. On December 3, 1982 the Committee of Management of the Veer Smarak Intermediate College resolved on accepting the appellant as Principal of the College on transfer from the other institution. On February 19, 1983, the District Inspector of Schools accorded his approval to the transfer.

4. Tomar now filed a writ petition in the Allahabad High Court. He obtained an interim order restraining the Committee of Management from permitting Rana to fill the post of principal of the College, but the interim order was vacated on March 9, 1983 and Rana has been working as Principal of the College ever since. On April 9, 1985 the High Court allowed the writ petition and quashed the order dated February 19, 1983 under which the District Inspector of Schools had accorded his approval to the transfer of Rana. In allowing the writ petition the High Court followed the Judgment of a Full Bench of the Court pronounced in Raghunandan Prasad Bhatnagar v. Administrator, Gandhi Vidyalaya Intermediate College, Khekra, (Civil Misc. writ Petn. No. 10301 of 1983) : (reported in 1985 Lab IC 1648). That was a case where the High Court re-examined the correctness of the views expressed by two Division Benches of the High Court in Ratan Pal Singh v. Deputy Director of Education, 1983 UP LB EC 34 and the Committee of Management, National Intermediate College, Adari Indara, District Azamgarh v. District Inspector of Schools, Azamgarh, 1983 UP LB EC 1983. The three learned Judges who heard the case were unable to come to a unanimous opinion, and by majority the Full Bench held that it was not permissible for the Committee of Management of an Intermediate College to fill the post of Principal of the College by tbe transfer of a principal from one Intermediate College to another after the commencement of the Services Commission Act.

5. To appreciate the scope and range of the contentions raised before us by the parties it is appropriate to set forth at the outset the relevant provisions of the two statutes and the pertinent Regulations S. 16-G of the Education Act provides :

"16-G. Conditions of service of Head of Institutions, teachers and other employees—

(1) Every person employed in a recognised institution shall be governed by such conditions of service as may be prescribed by Regulations and any agreement between the management and such employee in so far as it is inconsistent with the provision of this Act or with the Regulations shall be void.

(2) Without prejudice to the generality of the powers conferred by sub-sec. (1), the Regulations may provide for—

(a) the period of probation, the conditions of confirmation and the procedure and conditions for promotion and punishment, including suspension pending or in contemplation of inquiry or during the pendency of investigation, inquiry trial in any criminal case for an offence involving moral turpitude and the emoluments for the period of suspension and termination of service with notice.

(b) the scales of pay, and payment of salaries,

(c) transfer of service from one recognised institution to another,

(d) grant of leave and Provident Fund and other benefits, and

(e) maintenance of record of work and service."

The Regulations 55 to 62 detail the procedure to be followed when a permanent employee of an institution desires his transfer to another institution. An application for transfer is made to the Inspector of Schools. All applications for transfer are entered in a register. As soon as a substantive vacancy or a temporary vacancy likely to be made permanent and which is to be filled by direct recruitment is advertised, the Manager of the institution has to send a copy of the advertisement to the Inspector. The inspector will arrange with the Management to see whether the vacancy can be filled suitably by one of the applicants for transfer. When the vacancy in not filled by transfer, the Management may proceed to fill it by direct recruitment. To enable the transfer to take place it is necessary that the Management of the institution where the applicant is serving should be willing to release him and that the Management of the institution to which the applicant seeks transfer is willing to accept him. Apparently the appellant Rana relied on these provisions of the Education Act and the Regulations to obtain a transfer as Princinal from the B. P. Intermediate College, Bijwara to the Veer Smarak Intermediate College, Baraut.

6. In anticipation of the promulgation of the Services Commission Ordinance the U.P. Government issued a Radiogram to all District Inspectors in the State directing them to stop all fresh selections and appointments of Principals, Head Master and teachers including recruitment by promotion in all non-Government aided Secondary Schools, except Minority institutions, pending further orders. This was followed on July 19, 1981 by the Services Commission Ordinance, Clause 16 of the Ordinance provided that the appointment of a teacher (the expression teacher being defined to include a Principal) could be made by the Management only on the recommendation of the Commission and any appointment made in contravention of the clause would be void. Thereafter, the Services Commission Act was enacted S. 8 provides for establishing a

Commission to be called the "Uttar Pradesh Secondary Education Services Commission". It is to be a body corporate and entitled to exercise power throughout the State S. 10 provides :

"10 (1) For the purposes of making appointment of a teacher specified in the Schedule, the management shall nofity the vacancy to the Commission in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for appointment to the posts of such teachers shall be such as may be prescribed;

Provided that the Commission shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under sub-sec. (1)"

Section 11 details the procedure to be followed by the Commission after the notification of a vacancy under S 10 for the purpose of holding interviews of the candidates and preparing a panel of those found most suitable for appointment. The names on the panel are to be forwarded to the Management of the institutions in accordance with the prescribed procedure and the Management is to appoint a candidate accordingly. S. 16 declares :

"16 (1) Notwithstanding to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made there under but subject to the provisions of Ss. 18 and 33--

(a) every appointment of a teacher specified in the Schedule shall, on or after July 10, 1981, be made by the management only on the recommendation of the Commission.

(b) every appointment of a teacher (other than a teacher specified in the Schedule) shall, on or after July 10, 1981 be made by the management only on the recommendation of the Board :

Provided that in respect of retrenched employees, the provisions of S. 16-EE of the Intermediate Education Act, 1921 shall apply with the modification that in sub-sec. (2) of the aforesaid section, for the words six months the words 'two years' shall be deemed to have been substituted.

(2) Every appointment of a teacher, in convention of the provisions of sub-sec (1), shall be void."

Where a person is entitled to appointment as a teacher in any institution but is not so appointed by the Management, he is given the right to apply to the Director of Education, Uttar Pradesh for a direction to the Management to appoint him forthwith and to pay him salary from the date specified in the order. S. 22 provided for the imposition of a penalty on any person appointing a teacher in contravention of the provisions of the Act. Such contravention constitutes an offence punishable with imprisonment which may extend to three years or with fine up to Rs. 5000/- or with both S. 32 or which much will be said hereafter, provides :

"32. The provisions of the Intermediate Education Act, 1921 and the Regulations made thereunder in so far as they are not inconsistent with the provisions of this Act or the Rules or Regulations made hereunder shall continue to be in force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher."

7. Section 33 enables the State Government to pass orders for a period of two years from the date of commencement of the Act for the purpose of removing difficulties.

8. The central question is whether the enactment of the Services Commission Act results in the provisions of S. 16G (2) (C) of the Education Act and the Regulations made thereunder. If that is so, no transfer to the office of Principal in Intermediate Colleges can be made, except if at all, in accordance with the provisions of the Services Commission Act. In this Connection, one point which arises is whether the transfer of a Principal from one College to another constitutes an appointment in the latter. It is the case of the appellants that the power relating to appointments conferred on the Commission under the Services Commission Act does not in any way curtail the provisions regarding transfer set forth in the Education Act and its Regulations. It is urged that the right to apply for transfer is a condition of service of an employee, and neither expressly nor by necessary implication can it be said that the Services Commission Act has abrogated that right. It is a facility provided to every employee and, it is said, there must be clear language before that right can be taken away. It is contended that it is perfectly possible to read the Education Act and its Regulations side by side with the Services Commission Act and infer therefrom that the power of transfer continues to co-exist under the former with the power relating to appointments conferred on the Commission under the latter. There is no inconsistency between the two powers, it is submitted, and that is apparent when S. 32 of the Services Commission Act deals with the effect of the inconsistency between the provisions of the Education Act, and the Regulations made thereunder, and the provisions of the Services Commission Act, and its Rules and Regulations, in regard to the selection, appointment, promotion, dismissal removal, termination or reduction in rank of a teacher. This submission is based on the premises that the power of transfer is not encompassed within the power of appointment. So it is said that S 16 of the Services Commission Act which provides that the appointment of a Principal can be made by the Management only on the recommendation of the Commission does not bar the transfer of a Principal from one College to another.

9. As is clear by now, the fundamental basis of the contention that the power of transfer under the Education Act and its Regulations continues in force even after the enactment of the Services Commission Act rests on the assumption that the power of appointm-

ent does not include the power of transfer. In our opinion, the assumption is unsustainable. The scheme under the Education Act envisages the appointment of a Principal in relation to a specific college. The appointment is in relation to that College and to no other. Moreover, different Colleges may be owned by different bodies or organisations, so that each Principal serves a different employer. Therefore, on filling the office of a Principal to a College a new contract of employment with a particular employer comes into existence. There is no State-level service to which Principals are appointed. Had that been so, it would have been possible to say that when a Principal is transferred from one College to another no fresh appointment is involved. But when a principal is appointed in respect of a particular College and is thereafter transferred as a Principal of another College it can hardly be doubted that a new appointment comes into existence. Although the process of transfer may be governed by considerations and move through a machinery different from the consideratios governing the appointment of a person ab anitio as Principal, the nature of the transaction is the same, namely, that of appointment, and that is so whether the appointment be through direct recruitment, through promotion from the teaching staff of the same institution or by transfer from another institution.

10. It is pointed out that when S. 10 of the Service Commission Act requires that for the making of any appointment of a teacher the Management must notify the vacancy to the Commission it does not speak of "every vacancy", and designedly leaves the possibility open of some vacancies being filled by transfer. This submission is also without substance. A survey of the provisions of the service Commission Act makes it abundantly clear that the entire matter of selecting teachers for recognised institutions is intended to be governed by the Services Commission Act. As the Preamble of the Act itself suggests, that is the whole purpose of establishing the Services Commission. S. 3 envisages the Commission as a body corporate, an entity of continuing existence, manned by persons of eminence and distinction from the judicial services and the educational services and selected academicians with a superior level of teaching experience and armed with a carefully delineated power to select teachers, through a detailed procedure intended to select the best. No wonder then that S. 16 (1) mandates that "every appointment" of a principal can be made by the Management "only on the recommendation of the Commission." S 16 (2) goes further. It declares that every appointment made in contravention of S. 16 (1) shall be void. It is only in exceptional cases, where the Commission has failed to recommend the name of a suitable candidate for appointment within one year from the date of notification of the vacancy, or the post has actually remained vacant for more than two months then, under S. 18 (1), the Man-

agement may appoint, by direct recruitment or promotion, a teacher on a purely ad hoc basis from amongst the persons possessing qualifications prescribed under the Education Act or the Regulations made thereunder. S. 22 demonstrates how absolute is the ban on appointing a teacher through a procedure outside the provisions of the Services Commission Act, for the section provides that any person who appoints a teacher in contravention of the provisions of that Act shall, on conviction, be punished with imprisonment for a term which may extend to three years or with fine which may extend to 5000 rupees or with both. Any doubt remaining is removed completely by S. 32 of the Services Commission Act which permits the provisions of the Education Act and its Regulations to continue in force in so far only as they are not inconsistent with the provisions of the Servisions Commission Act, its Rules and its Regulations in the matter of the selection and appointment, among other things, of a teacher.

11. We are firmly of opinion that no duality in the source of power is contemplated in the matter of filling the office of Principal of a College. It is not possible to contemplate that transfer can be effected with the approval of the District Inspectors of Schools under the Education Act and its Regulations, while appointment (other than by transfer) can be made upon the recommendation of the Commission. The control over all appointments is exercised by a single source of power, namely the Commission under the Services Commission Act. It is no loger possible to invoke S. 16-G (2) (c) of the Education Act and its Regulations and transfer of Principal from one institution to another. The context in which those provisions operate, the authority conferred for that purpose and the conditions subject to which it can be exercised stand completely superseded by the corresponding provisions of the Services Commission Act, its Rules and Regulations. That is amply demonstrated by the declaration in S. 16 of the Services Commission Act which mandates that the appointment of a Principal shall be made only on the recommendation of the Commission "notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made there under." The scheme set forth in the Services Commission Act enacts a complete code in the matter of selection of teachers, and resort is no longer permissible to the provisions of the Education Act and its Regulations for that purpose. Where the Services Commission Act intended that any provision of the Education Act pertaining to the appointment of a teacher should continue in force, it expressly provided for such saving. For example, the proviso to S. 16 (1) of the Services Commission Act enacts that the provisions of S. 16-EE of the Education Act which provide for the absorption of retrenched employees against permanent vacancies shall apply with certain modifications.

12. A submission on behalf of the appellant is that the power to transfer the service of a teacher from one institu-

tion to another under S. 16-G(2) (c) of the Education Act is a condition of service and should not be identified with the power of appointment. We have already explained that in its essential nature the transfer of a teacher from one institution to another implies the cessation of his appointment in the former institution and his appointment to the latter. It will also be noticed that the selection of teachers of the categories mentioned in the Schedule to the Services Commission Act has been considered by the State Legislature of such manifest importance that a high powered Commission has been envisaged for discharging that function. It is a Commission consisting of persons holding positions of eminance in the Judicial Services or in the State Education Services or with teaching experience as University Professors and College Principals. It is intended that whenever a vacancy arises in the post of a teacher the Commission must be notified of it. In the selection of a teacher the Commission has been charged with the responsibility of inviting talented persons and selecting the best from among them. The selection has to be made in the context of the particular needs and requirements of the College. It is a responsibility of grave magnitude, the appointment of the head of an educational institution, and therefore most appropriately entrusted to the vison, wisdom and expereince of a high powered body, the Commission. To contemplate that a vacancy can be filled by transfer, even subject to the approval of the District Inspector of Schools, is to abmit the possibility of an appointment which does not measure up to the high standards and norms which the Commission can, having regard to its composition and status, be expected to apply. The Commission, as we have mentioned earlier, is envisaged as a corporate body constituted for the entire State. and in the selection of teachers as Principals and Lecturers of Intermediate Colleges and as Headmasters of High Schools and Trained Graduate Grade teachers of Higher Secondary Schools (the categories of teachers detailed in the Schedule), it can also be expected to bear in mind the needs and standards of education designed for the entire State. The object of the services Commission Act would be defeated if vacancies to posts of such responsibility and obvious importance in the field of education can be filled by bypassing the Commission and making apponitments by transfer under S. 16-G(2) (c) of the Education Act. As the Services Commission Act stands today, no appoiotment by such transfer can be envisaged to those vacancies which fall within the responsibilities of the Commission.

13. Our attention has been invited to the circumstance that even after the coming into force of the Services Commission Act the State Government has made amendments to the Regulations under the Education Act relating to the transfer of service under S. 16G (2) (c) of the Education Act. It is urged that the making of such amendments indicates the belief in the State Government that S 16G(2) (c) of the Education Act

continues to be operative. It is permissible to say, we think, that the making of those amendments cannot alter the true construction of the scope of the enactments under consideration. It may have been another thing altogether if an amendment had been made to S. 16-G(2) (c) of the Education Act itself, from which an inference may have been possible that the State Legislature, when amending that provision on the basis that it continues in operation, has given clear indication thereby that it was never intended that the provisions of the Services Commission Act should supersede S 16 G(2) (c) of Education Act.

14. In view of the aforesaid consideration, We hold that upon the constitution of a Commission under the Services Commission Act it is no longer possible for a vacancy in the post of Principal, Headmaster or teacher of the categories mentioned in the Schedule to the Services Commission Act to be filled by the process of transfer under S. 16-G (2) (c) of the Education Act and its Regulations. On this point we find ourselves in agreement with the majority opinion of the Full Bench of the High Court in Raghunandan Prasad Bhatnagar (1985 Lab IC 16-41) (supra and are unable to agree with what has been said by the Division Benches of that Court in Ratan Pal Singh, 1983 UPLBEC 34) (supra) and the Committee of Management, National Intermediate College, Adari Indara, District Azamgarh (1983 UPLBEC 198) (supra).

15. As the mandate imposed by S. 16(1) (a) of the Services Commission Act that the appointment of a Principal of an Intermediate College shall, on or after July 10,1981 be made only on the recommendation of the Commission, and inasmuch as the appointment by transfer of the appellant as Principal of the Veer Smarak Intermediate College took place after that date, the appointment of the appellant must be regarded as void.

16. The majority in Raghundanan Prasad Bhatnagar (1985 Lab IC 1548) (supra) has observed that S. 16-G(2) (c) of the Education Act should be limited to cases of mutual transfer of services between teachers serving in different instituions. We find it difficult to accept the accuracy of that observation, having regard to the view taken by us that S. 16G(2) (c) of Education Act cannot be pressed into service at all now in regard to vacancies intended to be filled on the recommendation of the Commission under the Services Commission Act.

17. An attempt was made by the appellant to show that the respondent Tomar is not entitled to continue as Principal of the Veer Smarak Intermediate College and our attention was invited to the provisions of successive U.P. Secondary Education, Services Commission (Removal of Difficulties) Order. Having regard to the finding that the appellant can have no claim to the office of Principal of that College on the basis of the transfer effected in his favour, we do not think it is open to him to challenge the continuation of the respondent Tomar in that office.

18. Civil Appeal No. 2072 of 1985 fails and is liable to be dismissed.

19. Civil Appeals Nos. 4091-4092 of 1985 have been filed by the District Inspector of Schools, Meerut in support of the claim of Om Prakash Rana and as they raise the same questions as Civil Appeal No 2072 of 1985 filed by Om Prakash Rana, learned counsel for the District Inspector of Schools adopts the submission made by learned counsel for Om Prakash Rana.

20. Civil Appeals Nos. 2628 and 2696 of 1985 arise out of substantially similar facts, and those appeals will also be governed by the view taken in the appeal preferred by Om Prakash Rana.

21. A Special Leave petition (S L. P. (C) No. 9542 of 1985) has been filed by Shashi Pal Singh praying for special leave to appeal against the judgment and order of the Allahabad High Court in which the High Court, following its view in Raghunandan Prasad Bhatnagar, (1985 Lab IC 1648) (supra) has quashed the appointment of the transferee the appointment of the transferee principal.

22. Upon the considerations which have found favour with us, the aforementioned appeal leave petition must fail.

23. In the result, all these appeals and the special leave petition are dismissed. There is no order as to costs.

Appeals and special leave
petitions dismissed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

Report No. 06 p. 01

A.P. Sen
Judge
Supreme Court of India

OBSERVATION

Discharge from service—Whether simpliciter or by way of punishment—Lady constable discharged from service, as stated on ground of inefficiency—Enquiry revealed that lady constable was staying in nights with male constable—Neither charge-sheet served nor provided the opportunity to be heard her—Held, order of discharge though apparently innocuous amounted to dismissal on ground of misconduct—Order is liable to be quashed and set aside due to violation of Constitution of India, Art. 311 (2)—Punjab Police Rules, 1934 Vol. 7, R. 12.21.

(Para 6, 13).

OBSERVED BY

A.P. Sen and B.C. Ray.
Hon'ble Judges Supreme Court of India

IN

Civil Appeal No. 2327 decided on 8-8-1986. between Smt. Rajinder Kaur. Appellant V. Punjab State and another, Respondents.

TEXT

Judgment :— After hearing the learned counsel for both the parties and on consideration of the question of law involved in this petition, special Leave is granted. Arguments heard.

2. The appellant petitioner was appointed as a lady constable in Hoshiarpur District on 7-5-1279. After completion of training she was posted in March, 1980 in the police lines, Hoshiarpur. The superintendent of Police, Hoshiarpur discharged the appellant from service by an order dated 9-9-1980 under R. 12.21, Volume 7 of the Punjab eapolice Rules, 1934. The said order is in following terms :

"Lady Constable Rajinder Kaur No. 732 is unlikely to prove an efficient police officer. She is, therefore, hereby discharged from the Police Force under P.P.R. 12.21 with effect from today (9-9-1980).

Issue orders in O. R. and all concerned to notice and necessary action."

3. This order was made, it has been stated in the petition, without serving any charge-sheet on her and without asing her to explain any charge. The order also has not recorded any reason for her discharge from service. Against this order the appellant made a representation to the Deputy Inspector-General of Police, Jullunder Range. The said representation was rejected on 17-10-1980. The appellant filed a revision against the order of the Deputy Inspect-

or General of Police and the same was also dismissed on 15-4-1981. The appellant thereafter filed a Civil Suit No. 327/ASSJ/82 in the Court of Additional Senior Sub-Judge, Hoshiarpur on 16-11-1981 challenging the order of discharge as bad, arbitrary and against the principles of law. The said suit was dismissed by the Additional Senior Sub-Judge, Hoshiarpur on 28-2-1983. Thereafter. the appellant filed an appeal before the District Judge, Hoshiarpur on 31-10-1983 and it was numbered as Civil Appeal No. 45 of 1983. The said appeal was dismissed on 7-5-1984 and the judgment of the trial Court was confirmed. A Regular Second Appeal No. 2198 of 1984 was filed before the High Court of Punjab and Haryana at Chandigarh. The said Second appeal was dismissed on 10-10-1984. Hence the instant application for grant of special leave to appeal under Art. 136 of the Constitution has been filed in this Honourable Court by the appellant.

4. the main argument advanced on behalf of the appellant is that the impugned order of discharge from service was made not in accordance with R. 12.21 of the Punjab Police Rules, 1934 in accordance with the terms and conditions of the service but was made by way of punishment. An enquiry was made by Deputy Police Superintendent, Garhshankar as to the character of the appellant into the allegation that She stayed at Mahalpur for 1 or 2 nights with one constable, Jaswant singh and evidences were recorded therein without giving the appellant any opportunity of hearing in the enquiry and without giving her any opportunity to cross-examine the witnesses and the impugned order was made after the completion of the investigation on the ground of her misconduct which case a stigma on her service career. The order in question is, therefore, not an innocuous one though expressed in innocuous terms. It is made by way of punishment, the ground being her misconduct as found on the basis of the investigation and certain allegations behind her back.

5. It was urged on behalf of the respondents that the order discharging the appellant from service was not made by way of punishment. The order was made in accordance with the terms of Rs. 12.21 of the said Rules which empowers the authorities to do away with the service of the constable at any time within three years of her enrolment, if she is found unlikely to prove an efficient Police officer, by the Superntendent or police and appeal has been provided for under the Rules against the said order of discharge. It was, therefore, urged that the order being made in accordance with the conditions of service of the appellant and so it is unchallengeable before this Court by filing a special leave petition to appeal.

6. Admittedly, the appellant was appointed as a lady constable on 7-5-1979 and She was posted in March, 1980 in the Police lines, Hoshiarpur after completion of her training. It has been stated in para. 15 of the petition that on

an allegation made by the department against the appellant that she spent two nights with a constable an investigation was caused to be made into the said allegation against her conduct and on the basis of that investigation the impugned order of discharge was made by the Superintendent of Police, Hoshiarpur In para 15 of the counter-affidavit sworn on behalf of repondentsxit has been stated that the Superintendent of police, Hoshiarpur, got conducted a confidential enquiry through a Deputy Superintendent of Police regarding the conduct of the appellant. On an overall assessment of the work and conduct of the appellant, the Superintendent of Police, Hoshiarpur came to the conclusion that she was not likely to become an efficient Police Officer and thus passed an order discharging her from service in accordance with the conditions of the service. These averments made in para 15 of the counter-affidavit have been verified to be true and correct to the knowledge of the deponent based upon the information derived from the record of the case. Thus, it is clear from these averments that the impugned order of discharge though stated to be made in accordance with the provisions of R. 12 21 of the Punjab Police Rules, 1934, is really made on the basis of the misconduct as found on enquiry into the allegation behind her back by the Deputy Superintendent of Police, Garhshankar. It is not disputed that the enquiry was made without serving her the charge-sheet and without giving her any opportunity to explain the charges and the allegation levelled against her. The enquiry was conducted behind her back and on the basis of the result of the investigation she was discharged from service. Therefore in these circumstances, it does not lie in the month of the respondents to submit before this court that the order is an innocuous one and it is an order made simply in accordance with the conditions of her service under R. 12.21 of the said Rules. On the other hand, in the background of these facts and circumstances it is crystal clear that the impugned order of discharge from service of the appellant was made on the ground of her misconduct and it is penal in nature as it casts a stigma on the service career of the appellant.

7. The next question that arises is whether the appellant who is yet to be confirmed in the service and has no right to the post in question, the impugned order can be assailed as violative of the protection give by Art. 311 (2) of the Constitution. This point has been well-settled by several decisions of this Court.

8. This Court has stated in no uncertain terms in the case of P.L Dhingra v. Union of India, 1958 SCR 828 at p. 862 : as follows :

"But even if the Government has by contract under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art 311 must be complied with"

9. This decision has been relied upon by this Court in the case of K. H. (Phadnis v. State of Maharashtra, 1971 Supp) SCR 118 : (AIR 1971 SC 998) where it has been held that even in the case of reversion of an employee who has been repatriated from the temporary post of Controller of Food Grains Department to his parent department of excise and Prohibition, to which he had a lien might be sent back to the substantive post in ordinary routine administration or because of exigencies of service. Such a person may have been drawing a salary more than that of his substantive post but when he is reverted to the parent department the loss of salary can not be said to have any penal consequences. The matter has to be viewed as one of substance and all relevant factors have to be considered in ascertaining whether the order is a genuine one of accidence of service in which a person sent from the substantive post to a temporary post has to go back to the parent post without any aspersion against his character or integrity, or whether the order amounts to a reduction in rank by way of punishment.

10. It has been further observed by this Court in the case of State of Bihar v. Shiva Bhukshuk Mishra, (1971) 2 SCR 191 at p. 196 :

"The form of the order is conclusive of its true and it might merely be a cloak and camouflage for an order founded on misconduct. It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment of administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overrining test will always be whether the misconduct is a mere motive or is the very foundation of the order."

11. In the case of Shamsher Singh v. State of Punjab, (1975) 1 SCR 814 at p. 837 it has been observed as under :—

"No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order or termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given cause amount to removal from service within the meaning of Art. 311 (2) of the Constitution."

12. It has been observed by this court in the case of Anoop Jaiswal v.

Government of India, (1984) 2 SCR 453 as under:—

"Where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenge to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employees"

13. On a conspectus of all these decisions mentioned herein before the irresistible conclusion follows that the impugned order of discharge though couched in innocuous terms, is merely a camouflage for an order of dismissal from service on the ground of misconduct. This order has been made witout serving the appellant any charge-sheet without asking for any explanation from her and without giving any opportunity to show cause against the purported order of dismissal from service and without giving any opportunity to cross-examine the witnesses examined, that is, in other words the order has been made in total contravention of the provisions of Art 311 (2) of the Constitution. The impugned order is, therefore, liable to be quashed and set aside. A writ of certiorari be issued on the respondents to quash and set aside the impugned order date 9-9-1980 of her dismissal from service. A writ in the nature of mandamus and appropriate directions be issued to allow the appellant to be reinstated in the post from which She has been discharged. The appeal is thus allowed with costs. The authorities concerned will pay all her emoluments to which she is entitled to in accordance with the extant rules as early as possible in any case not later than eight weeks from the date of this judgment.

Appeal allowed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

Report No. 07 p. 01

E. S. Venkataramiah
Judge
Supreme Court of India

OBSERVATION

(A) Premature retirement—Judicial service—Governor passing order only on recommendation of Administrative Judge and not on recommendation of Administrative Committee or Full Court—Order of premature retirement of Ditrict and Sessions Judge, held, was void—Constitution of India, Arts. 232, 225—(Allahabad Rules of Court (1952), Chap. 3, Rr. 3 to 5).

(Para 10, 13, 14)

(B) Premature retirement—Judicial service—Government cannot take the initiative to retire prematurely a judicial officer—Such initiative should rest with the High Court.

OBSERVED BY

E. S. Venkataramiah and Ranganath Misra
Hon'ble Judges Supreme Court of India.

IN

Civil Appeal No. 1243 of 1972 decided on 5. 8. 1986 between Tej Pal Singh, Appellant v. State of U. P. and another, Respondents.

TEXT

Venkataramiah, J. :—The appellant was working as an Additional District and Session Judge in the State of Uttar Pradesh in the year 1968. His date of birth was April 1, 1913. He would have retired from service on the expiry of March 31, 1971 on completing 58 years of age. But on September 3, 1968 the appellant was served with an order dated August 24, 1968 issued by the Secretary to the Government of Uttar Pradesh (Home Department) stating that the Governor of Uttar Pradesh in exercise of the powers under para (i) of the first proviso to clause (a) of Fundamental Rule 56 contained in the Financial Hand Book, Volume II, Parta II to IV, as amended from time to time, had been pleased to order that the appellant should retire from service on the expiry of three months from the date of service of the notice. Aggrieved by the said notice of premature retirement, the appellant filed Writ Petition No. 3958 of 1986 before the High Court of Allahabad under Article 226 of the Constitution urging Inter alia (i) that the retirement of the appellant as per order dated August 24, 1968 had been ordered without the recommendation of the High Court as required by Article 235 of the Constitution, (ii) that Fundamental

Rule 56 under which the impugned order had been issued was violation of Articles 14 and 16 of the Constitution, and (iii) that the appellant's premature retirement was in violation of Article 311 (2) of the Constitution. The question relating to the validity of Fundamental Rules 56 was involved in two other cases which were pending before the High Court. The Writ Petition filed by the appellant and the other two writ petitions were heard together by a Division Bench of the High Court. The Division Bench referred all the three matters to a Full Bench to consider two specific question of law, namely (i) whether under Fundamental Rule 56 the age of superannuation was 55 or 58 years and (ii) whether the proviso to clause (a) of Fundamental Rules 56 violated Articles 14 and 16 of the Constitution. Thereafter the Full Bench heard all the three cases and answered the two questions as follows : (i) Under clause (a) of Fundamental Rule 56 the age of superannuation was 58 years and (ii) Paragraph (i) of the proviso to clause (a) of the Fundamental Rule 56 violated Articles 14 and 16 of the Constitution. The judgment of the Full Bench was pronounced on September 26, 1969. Immediately thereafter the Governor of Uttar Pradesh issued an Ordinance dated November 5, 1969 making amendments to Fundamental Rule 56 and validating actions already taken thereunder. The Ordinance was replaced by U.P. Act No. 5 of 1970 of April 1, 1970. The appellant sought the amendment of the Writ Petition questioning the validity of the Ordinance and the Act. There after the Writ Petition was heard by Division Bench of the High Court and it came to be dismissed on February 23 1970. This appeal by certificate is filed against the judgment of the High Court

2. In this case we are not concerned much with the validity of Fundamental Rule 56 since it can be disposed of on the ground based on Article 235 of the Constitution.

3. The undisputed facts as can be gathered from the records in this case which are relevant for purposes of this appeal are these. The State Government moved the High Court in the year 1967 for the premature retirement of the appellant. On July 8, 1968 the Administrative Judge agreed with the proposal of the State Government to retire the appellant prematuraly after giving him three months' notice. The Governor passed the order of retirement on August 24, 1968. Three days thereafter, on August 27, 1968 the Administrative Committee of the High Court gave its approval to the recommendation the Administrative Judge earlier communicated to the State Government. Thereafter on August 30, 1968 the Additional Registrar transmitted the order of the appellant. It was actually served on September 3, 1968. The question for consideration it this case is whether the order of compulsory retirement passed against the appellant satisfies the requirements of the Constitution.

4 Article 235 of the Constitution provides that the control over district

E.S. Venkataramiah
Judge
Supreme Court of India

courts and courts subordinate thereto including the posting and promotion of and the grant of leave to persons belonging to the judicial service of the State and holding any post inferior to the post of District Judge shall be vested in the High Court It has been held in State of Uttar Pradesh v., Batuk Deo Patil Tripathi (1978) 3 SCR 131 : (1978 All LJ 477) that premature retirement of Judges of District Courts and of subordinate courts is a matter which falls squarely within the power of control vested in the High Courts by Article 235 of the Constitution without the recommendation of the High Court it is not open to the Governor to issue an order retiring prematurely Judges of District Courts and of subordinate courrs.

5. Insofar as the High Court of Allahabad is concerned rules are framed under Article 225 of the Constitution and all other powers enabling it in that behalf by the High Court regarding the manner in which the administrative work of the High court should be carried out. They are known as Rules of Court 1652. The relevant rules are found in chapter 111 of the Rules of Court, 1952. The material part of Chapter 111 is set out below: –

CHAPTER 111

Executive and Administrative Business of the Court

1. Subject to these Rules, a Committee of Judges composed of the Chief Justice, the Judge in the Administrative Department and five other Judges to be appointed by the Chief Justice, referred to in these Rules as the Administrative Committee, shall act the Court. The Chief Justice shall have the Charge of, and may act for the Court in the Administative Department and the executive and administrative business pertaining to the Court, except, that the Judge in the Administrative Department shall have charge of, and may act for the Court in Administrative Department and the executive and adminstrative business pertaining to the Courts subordinate to the Court. As for as possible the Judge in the Administrative Department shall discharge his duties and functions in consultation with the Inspection Judges concerned, who shall be appointed by the Chief Justice from time to time.

The membership of the Committee shall be for two years except in the case Chief Justice and the Judge in the Administrative Department.

2. From time to time and as occasion arises the Chief Justice shall nominate one of the Judges to act as the Judge in the Administrative Department, whose term of office shall be three years unless renominated.

3. All executive and administrative business and all business in the Administrative Department requiring orders ………shall be submitted by the Registrar to the Chief Justice or the Judge in the Administrative Department, as the case may be, together with his

comments thereon, if any, and may, subject to these Rules, be disposed of by that Judge.

4. The Judge in the Administrative Department shall, before passing final orders cause to be circulated for the information of the Judges of the Administrative Committee then present in Allahabad, his recommendations as to the appointment, promotion or suspension of judicial officers.

Should any Judge dissent from such recommendations, he shall signify his dissent and his reasons therefore in writing.

5. (1) In regard to the following matters the Judge in the Administrative deprtment shall consult the administrative Committee either by circulating the papers connected with the matter together with his own opinion or recommendation thereon to the members of the Committee then present in Allahabad or by laying it before a meeting of the Administrative Committee, namely :

(a) the issue of General Letters to subordinate courts;

(b) the issue of directions regarding the preparation of returns and statements;

(c) all matters of importance upon which the Government desires the opinnion of the Court;

(d) appointment of the U.P Higher Judicial Service; and

(e) any other matter which the Chief Justice or the Judge in the Administrative Department may consider fit to be laid before it for consideration.

(2) Copies of all General Letters issued to subordinate courts shall be circulated to all Judges for information as soon as may be after issue.................

(7) As soon as the Administrative Committee has disposed of any business, a statement showing what matters were laid before the Committee and the manner in which they were disposed of shall be circulated for information to all Judges except such Judges as may be on leave."

6. In the above decision, State of Uttar Pradesh v. Batuk Deo Patil Tripathi (1978 All LJ 477) (supra) this Court has held that the power of the High Court under Article 235 of the Constitution to make recommendation to the Government to retire a subordinate judicial officer permaturely could be exercised by the Administrative Committee of the High Court. In the instant case, it is seen that the Administrative Commitiee of the High Court came into the picture only after the State Government had passed the order of retirement. It was no doubt true that the Administrative Judge had agreed with the proposal of the State Government to retire the appellant prematurely on July 8, 1968 and that on the basis of the opinion expressed by the Administrative Judge the Governor had passed the order on August 24, 1968 It was only on August

7, 1968 the order of the Governor was laced before the Administrative Committee of the High Court when it gave ts approval to the opinion of the Administrative Judge earlier communicated to the State Government. After he Adminstrative Committee had exressad its opinion the matter was not gain referred to the Governor at all. After the Administrative Committee had pproved the opinion of the Administative Judge the order of retirement was erved on the appellant on September 3, 968 It is thus seen that Governor ad not acted in the instant case on he basis of the recommendation of tiher the Full Court or of the Adminisrative Committee had approved the pinion of the Administrative Judge he order of retirement was served on he appellant on September 3, 1968. It s thus seen that the Governor had not cted in the instant case on the basis f the recommendation of either the Full Court or of the Administrative Committee of the High Court but only n the opinion of the Administrative udge.

7. The two learned Judges who inally heard the Writ Petition of the ppellant dealt with the question of ompliance with Article 235 of the Constitution in the two separate Judgments elivered by them Both the learned udges, we regret to say, missed the ssence of the question agitated before hem They have referred to Article 33 of the Constitution in the course t their judgment while the proper Artcle which arose for consideration before them was Article 235 of the Constitution. Both the learned Judges have taken the view that Governor is only expected to consult the High Court on the question when he proposes to make an order or premature retirement in respect of a District Judge or a subordinate judicial officer. They have overlooked that the Governor can pass such an order only on a recommendation made by tha High Court or the Administrative Committee. The second error committed by both of them is that they have held that such consultation with the High Court is permissible even after the Governor has passed the order of compulsory retirement. Thirdly, they have equated the recommendation that should be made by the High Court before a judicial officer can be prematurely retired to the consultation contemplated under Article 320 (3) (c) of the Constitution, which provides that the Union Public Service Commission or the State Public Service Commission as the case may be, shall be consulted on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters, and have held relying upon a decision of this Court in State of U P. v Manbodhan Lal Srivastava 1958 SCR 533 : (AIR 1957 SC 912) that such consultation was not mandatory and that failure to do so did not afford a cause of action to the appellant in a court of law.

8. In State of Haryana v. Inder Prakash Anand H. C. S. 1976 (Supp)

SCR 603 : (AIR 1976 SC 1841) this Court has held that Article 235 of the Constitution vests in the High Court control over district courts and courts subordinate thereto. This "control" includes both disciplinary and administrative jurisdiction. Disciplinary conrol means not merely jurisdiction to award punishment for misconduct, but also the power to determine whether the record of a member of the service is satisfactory or not so as to entitle him to continue in service for the full term till he attains the age of superannuation. Administrative, judicial and disciplinary control over members of the judicial service is vested solely in the High Court. Premature retirement is made in the exercise of administrative and disciplinary jurisdiction. It is administrative because it is decided in public interest to retire him prematurely and it is disciplinary, because, the decison is taken in public interest that he does not deserve to continue up to the normal age of superannuation. the fixation of the age of superannuation is the right of the State Government. The curtailment of that period under rules governing the conditions of service is a matter pertaining as well as administrative control. The control which is vested in the High Court is complete control subject only to the power of the Governor in the matter of appointment, dismissal, removal or reduction in rank and the initial posting of and initial promotion to the rank of District Judge. The vesting of complete control over the subordinate judiciary in the High Court, leads to this that if the High Court is of opinion that a particular officer is not fit to be retained in service, the High Court will communicate that opinion to the Governor, because, the Governor is the authority to dismiss, remove or reduce in rank or terminate the appointment. In such cases, the Governor, as the head of the State, will act in harmony with the reommendation of the High Court as otherwise the consequences will be unfortunate. But, compulsory retirement simpliciter does not amount to dismissal or removal or reduction in rank under Article 311 or under service rules. When a case is not of removal or dismissal or reduction in rank, any order in respect of exercise of control over the judicial officers is by the High Court and by no other authority; otherwise, it will affect the independence of the judiciary. It is in order to effectuate that high purpose that Article 235 of the Constitution, as construed by this Court in various decisions, requires that all matters relating to the subordinate judiciary including premature retirement and disciplinary proceedings but excluding the imposition of punishment fall it within the scope of Article 311 of the Constitution and the first appointment on promotion should be dealt with and decided upon by the High Courts in exercise of the control vested in them.

9. In High Court of Andhra Pradesh v. V.V.S Krishnamurthy (1979) 1 SCR 26, this Court has again observed

that Article 235 of the Constitution is the pivot around which the entire scheme of the Chapter VI of Part VI of the Constiution revolves. Under it the control of district courts and courts subordinate thereto including the posting and promotions of and the grant of leave to persons belonging to the judicial service of a State is vested in the High Court. After considering a number of decisions, the Court in that case has set out the true legal position crystallized by the said decisions as regards the scope of the control of the High Court over the subordinate judiciary vested in it under Article 235 of the Constitution The Court proceeded to observe that the said power under Article 235 of the Constitution was exclusive in nature, comprehensive in extent and effective in operation. Amongst the several matters which fell within its scope, this Court was of the view that premature retirement of Judges of the district courts and of the subordinate courts was one.

10. It is thus clear that the High Court was in error in not construing the applicability, and the scope of Article 235 of the Constitution while deciding the case before it. It assumed that the Governor after consulting the High Court could pass an order of premature retirement in respect of a District Judge or a subordinate judicial officer and even if he did not consult in that regard the order of premature retirement passed by the Governor would not be vitiated and that in any event it was an irregularity which could be cured by rule 21 of the Court Rules, 1952.

11. The relevant passages in the judgments of the two learned Judges who decided the case in the High Court are given below :

"(Per D.S. Mathur, J.)

In the case of premature retirement consultation, if made subsequently, but before the officer actually retires, that is, hands over charge, cannot in each and every case he said to be illusory and not genuine. It is only when it appears that after the passing of the order of compulsory retirement, the High Court did not consider the matter on merits but accepted the fait accompli, it can be said that there had been no consultation as contemplated by Article 233 (1); but where the High Court did consider the matter on merits and agreed with the order passed by the Governor directing the compulsory retirement of a judicial officer, there would be no defect, considering that the order of retirement shall take effect from the date of communication or from the date the government servant is to retire from service. In the instant case, three months' notice was given, that is, the officer was to retire from service on the expiry of three months from the date of communication of the order of retirement. Within this period the matter could be considered on merits by the High Court on its own or on a representation made by the officer. We are, therefore, of opinion that the consultation of the High Court cannot be declared invalid simply because there was no proper and full consultation before the passing of the order of premature retiremnt, provided that the facts and circumstances of the case made it evident that the High Court had not been unduly influenced by the decision of the Governor and the High Court had on its own and independently considered the matter on merits.

Reference may now be made to rule 21 of Chapter III of the Rules of Court, which clearly provides that no irregularity in, or omission to follow, the procedure laid down in this Chapter shall affect the validity of any order passed or anything done under these rules. This rule cannot cover a case where any order was passed in complete disregard of the rules contained in Chapter III; but on irregularity committed in good faith shall not invalidate the order. The principles governing the provisions like section 5 of the Limitation Act can easily be made applicable to a case of the present nature. Where two opinions ase possible the irregularity, if any, cannot be deemed to have been committed in bad faith and such irregularities shall be covered by lhe above rule 21."

"(Per Satish Chandra, J,)

Under Chapter III rule 5 the Administrative Judge had to consult the Administrative Committee. Even if the consultation takes place subsequently if the committee approves of the action of the Administrative Judge, then the original action would be valid and effective with effect from its own date In this view, the communication of the Court's opinion on the 8th July, 1968 would be valid

Even if it be assumed that the communication of 8th July, 1968 did not satisfy the requirements of law, still the petitioners have not made out a case for interference. It has been seen that the Administrative Committee took the decision on the 28th August, 1968. By then the Governor had considered the opinion of the Court as sent to it on the 8th July, 1968. The Governor sent the order of compulsory retirement to the High Court. The High Court transmitted it for service on the petitioners on or about the 2nd September, 1968, much after the Administrative Committee had approved the proposal The order was served on the petitioner on 3rd September, 1968. Thus before the order of compulsory retirement came into force on 3-9-1968, all the requisite reqirements of Article 233 of Constitution had been completed. In this situation, rule 21 would come in to play and would cure whatever irregularity took place in following the procedure laid down in Chapter III of the Rules of the Court The impugned, order cannot be held to have violated Article 233 of the Constitutin"

12. We do not approve of the above opinions of the learned Judges of the High Cour.

13. Now, it is settled by the decision of this Court in the State of Uttar Praaesh v. Batuk De o Patil Tripathi (1978

All LJ 477) (supra) that on a true construction of the rules of businass of the Allahabad High Court it was opened to the Administrative Committee to recommend to the Governor to pass an order of compulsory retirement in respect of a District Judge or a subordinate judicial officer. We need not, therefore, go into the question whether the Full Court alone should have considered the case of the appellant before such recommendation was made. In the instant case as we have already stated above, the Administrative Committee came to know of the order of premature retirement already passed by the Governor only after it had been passed on the basis of the opinion expressed previously by the Administrative Judge. The Rules of Business in Chapter 111 of the Rules of Court, 1952 referred to above show the powers which are exercisable by the Full Court, the Chief Justice, Judge in the Administratment (Administrative Judge) and the Administrative Committee of the High Court, Rule 3 of Chapter 111 of the Rules lays down that all executive and admininstrative business and all business in the Administrative Department requiring orders shall be submitted by the Registrar to the Chief Justice or the Administrative Department, as the case may be, together with this comments thereon, if any be subject to these Rules disposed of by that Judge. Rule 4 provides that the Judge in the Administrative Department shall before passing final order, cause to be circulated for the information of the Judges of the Administrative Committee then present in Allahabad his recommendations as to the appointment, promotion or suspension of judicial officers, and that should any Judge dissent from such recommendations, he shall signify his dissent and his reasons therfor in writng. Rule 5 provides that in regard to the matters set out thereunder the Judge in the Administrative Department shall consult the Administrative Committee either by circulating the papers connected with the matter with his own opinion or recommendation thereon to the members of the Committee then present in Allahabad or by laying it before a meeting of the Administrateve Committee and one of the items mentioned in clause (c) of rule 5 (1) of the Rules is 'all matters of importance upon which the Government desires the opinion of the of High Court. In the instant case the Government had sought the opinion of the High Court regarding the question whether the appellant could be prematurely retired and that question was certainly a very important matter from the point of the subordinate judicial. The Adminstruve Judge before giving his opinion in support of the view expressed by the Government should have either circulated the letter received from the Government had sought the members of the Administrative Committee or placed it before them at a meeting. He did not adopt either of the two courses. But he on his own forwarded his opinion to the Government stating that the appellant could be prematurely retired. That he could not do. Ordinarily, it is for the High Court, on the basis of assessment of performance and all other aspects germane th the matter to come to the conclusion whether any particular (judicial officer under its control is to be prematurely retired and once the High Court comes to the conclusion that there should be such retirement, the Court recommends to the Governor to do so. The conclusion is to be of the High Court since the control vests therein. Under the Rules obtaining in the Allahabad High Court, the Administrative Committee could act for and on behalf of the Court but the Administrative Judge could not have. Therefore, his agreeing with the Government proposal was of no consequences and did not amount to satisfaction of the requirement of Article 235 of the Constitution. It was only after the Governor passed the order on the basis of such recommendation, the matter was placed before the Administrative Committee before the order of retirement was actually served on the appellant. The Administrative Committee may not have dissented from the order of the Governor the opinion expressed by the Administrative Judge earlier. But it is not known what the Administrative Committee would have done if the matter had come up before it defore the Govenor had passed the order of premature retirement. In any event the deviation in this case is not a mere irregularity which can be cured by the ex post facto approval given by the Administrative Committee to the action of the Governor after the order of premature retirement had been passed. The error committed in this case amounts to an incurable defect amounting to an illegality. We may add that while it may be open to the Government to bring to the notice of the High Court all materials having a bearing on the conduct of a District Judge or a subordinate judicial officer, which may be in its possession, the Government cannot take the initiative to retire prematurely a District Judge or a subordinate judicial officer, such initative should rest with high Court.

14. Under the circumstances, it has to be held that the impugned order of premature retirement passed by the Governor without having before him the recommendation of the Administrative Committee or of the Full Court is void and ineffective. We, therefore, set aside the judgment of the High Court and quash the order of premature retirement passed in respect of the appellant. He shall be treated as having been in service until the expiry of 31-3-1971 when he would have retired from service on attaining 58 year of age.

15. We are informed that the appellant has died on 27-11-1983 and his legal representatives have been brought on record. The arrears of salary, pension etc. payable to the appellant on the above basis till 27-11-1983 shall, therefore, be paid to the legal representatives of the appellant within four months from today. This appeal is accordingly. The legal representatives of the appellant are also entitled to the costs in both the Courts.

Appeal allowed

Report No. 08, p. 01

R. B Misra
Judge
Supreme Court of India

OBSERVATION

(A) Compulsory retirement–Includes premature retirement—Haryana service of Engineers—Age of superannuation—Not reduced to 50 years by virtue of sub-cl - (1) of R 326 (c) (Constitution of India, Art 311—Punjab Civil Services Rules, Vol. I Part I R. 3.26 (c) (1) (as applicable to Haryana). (Para 13)

(B) Compulsory retirement by giving 3 month's notice—R. 326 (d) is not applicable to P. W. D. Engineer—Cl. (d) is supplemental to cl. (a) of Rs. 3.26; AIR 1960 SC 247, Rel. on Punjab Civil Services Rules, Vol. I Part I R. 326 (d) as appicable to Haryana)—Applicability— (Paras 14, 15)

(C) Protection from premature retirement—Under Sub Cl. (1) of R. 326 (c) of Punjab Civil Services, Rules, Vol I Part I R. 3.26 (c) as applicable to Haryana—It is a special rule applicable to Engineers and overrides the general—R. 3.26 as stood prior to 1980 also gave complete immunity to Supdt. Engr. from premature retirement (Constitution of India, Art 311) Order of P & H High Court D/- 5.1.1984 Reserved Punjab Civil Services Rules, Vol. I Part IR. 3.26 (c). (Paras 9,11,17,19)

OBSERVED BY

E. S. Venkataramiah and R.B. Misra
Hon'ble Judges Supreme Court of India

IN

Civil appeal No. 4953 of 1985, decided on 4.11.1985 between S.C. Jain Appellant v. State of Haryana and another, Respondents.

TEXT

Misra, J :—Special leave granted.

2. This appeal by special leave is directed against the order of the High Court of Punjab and Haryana dated 5th January 1984 dismissing the writ petition in a service matter.

3. The appellant joined service as a Sub-divisional Officer (Assistant Engineer) in Class II on 28th August 1953 in the former State of Pepsu. On 1st November 1956 the State of Pepsu and Punjab were merged and the appellant was integrated in the service of the recognised State of Punjab. He worked on this post for about eight years and during this period he was posted at various places in the State and was assigned different kinds of duties. The authorities being satisfied with his preformance, he was promoted to the post of Executive Engineer in Class I Gazetted on 24th May, 1961. He was allowed to cross the efficiency bar immediately when

it became due On this post he worked for about ten years Considering the efficiency and suitability of the appellant he was confirmed on the post of Executive Engineer in class I Gazetted on 1st April, 1965.

4. On 1st November 1966 the State of Punjab was bifurcated into the State of Punjab and the State of Haryana on the reorganisation of the State of Punjab the petitioner came to be allocated to the service of the State of Haryana. In the new State also his performance was excellent and the authorities satisfied with his meritorious services. gave him a selection grade of the post of Executive Engineer. The admission of the appellant to the selection grade itself is indication of the fact that the authorities were satisfied with his work honesty, integrity and his capability. In due course the appellant was also promoted to the post of Superintending Engineer on 9th February, 1970. He had hardly worked for about a month when he was reverted but not because of any complaint against him or his inefficiency but because one of the posts of Superintending Engineers was reduced by the Government. The appellant being junior-most was reverted. But when the post of a Superintending Engineer again fell vacant the State of Haryana promoted the appellant to the said post promptly on 27th May 1971. On account of his meritorious service he was found fit to be posted first as additional Director of Technical Education Haryana for about four years and
thereafter as director P.W.D. (B & F
Research Laboratory at Nilokheri. Th
work of the P W D. Laboratory wa
highly specialised and skilled and requ
red care, precision and accuracy an
only officers of the merit and prove
ability, competence and having researc
aptitude are posted there The appel
ant was considered to be the mos
appropriate officer for the post.

5. The appellant by a letter date
19th October, 1981 was offered the pos
of Superintending Engineer on deput
ation to the Delhi Development Autho
rity. This offer was made to the appell
ant in view of the request from th
Delhi Development Authority for name
of suitable officers. Again on 11t
December 1981 the appellant receive
a telegram from the office of the Engi
neer-in-Chief seeking the willingness o
the appellant for nomination for th
post of Civil Engineer for an assignmen
with the Government of Libya. Shortl
thereafter the appellant received anothe
offer from the office of the Engineer
in-Chief, Haryana P.W D. (B & R)
Chandigarh on 15th December, 1981
This offer was pursuant to the reques
of the management of Dayanand Univ
ersity, Rohtak asking for names o
Superintending Engineer for the post o
Chief Engineer. This offer was made
only to the Superintending Engineers
who were considered competent by the
Engineer-in-Chief, Haryana P W. D.
(B & R), Chandigarh.

6. The sequence of events and the
promotion of the appellant to higher

and higher posts in quick succession speak for themselves and they unmistakably indicate that the authorities were satisfied with his work and integrity. So far all was well with him

7. It appears that on 15th December, 1981 the appellant applied for casual leave for four days from 21st to 24th December, 1981 and the station leave from 19th to 27th December which was sanctioned by the office of the Chief Engineer on 17th December 1981. When he was availing the leave he received a telegram intimating that his casual leave and station leave have been cancelled Neither the telegram nor the confirmatory letter dated 21st December, 1981 received subsequently disclosed the reason for the cancellation of leave. The appellant, therefore, had to join and resume has duties as per instructions in the said telegram. The appellant received the impugned order No. 11/3-BR (Estt)-6-81, dated 18th December, 1981 from the Government on 29th December, 1981 prematurely retiring him from service after attaining the age of 50 years. The impugned order of premature retirement dated 18th December, 1981 is in the following terms :

"Whereas the Governor of Harayana is of the opinion that it is in the public interest to retire Shri S. C. Jain, Superintending Engineer, Haryana P.W.D. (B & R Branch) from service after attaining the age of 50 years.

Now, therefore, in pursuance of the provisions contained in rule 5. 32 (c) of the Punjab Civil Services Rules Vol. II, Part II and rule 3. 26 (b) of the Punjab Civil Services Rule Vol. I, as applicable to the State of Haryana, the Governor of Haryana in the Public interest hereby orders the payment of three month's pay and allowances in lieu of notice to Shri S.C. Jain, Superintending Engineer and retires him from Haryana Government Services with effect from the date of receipt of this order.

By Order of the Governor

Sd/- Commissioner & Secretary to Govt. Haryana PWD B R Branch"

8. The appellant made several representetations against the order of premature retirement on 25th January, 1982, 26th April, 1982, 25th July 1982 to the respondents with copies forwarded to the Chief Minister of Haryana, Minister for P.W.D. Haryana and the Engineer-in-Chief P.W.D. B & R Branch, Haryana. The appellant, however, did not receive any reply despite repeated reminders. The appellant also separately submitted representation to the Chief Minister, Haryana in January 1982. The same forwarded to the then Minister for PWD (B & R), Kanwar Ram Pal Singh for examining the representation in detail, who after examining the position made the following remarks on the representation itself :

"Recommended strongly restoring him to his original post.

Sd/— Ram Pal Singh
PWM 25th April 1982"

Despite the recommendation of the P. W.D. Minister the appellant got no relief. Under the circumstances he was constrained to take recourse to court of law and he challenged the impugned order of premature retirement by filing a writ petition in the High Court of Punjab and Haryana on grounds inter alia that in view of the clear provisions contained in the rule 3.26 (c) of Punjab Civil Services Rules Vol. I, part I (as applicable to Haryana), which are special rules applicable to the Public works Department Officers, the general rule contained in rule 3 26 (d) empowering the Government to compulsorily retire a public servant has no application to the present case. Curiously enough the High Court dismissed the writ petition in limine by a cryptic order :

"No merit. Dismissed" The appellant has now approached this Court by special leave. He has taken all those grounds taken by him in the writ petition.

9. Dr. Y. S. Chitale appearing for the appellant forcefully urged that in view of the povisions of rule 3.26 (c) of the Punjab Civil Services Rules, Vol. I, part I, the appellant could not be retired prematurely. We heard the counsel for the parties on this point first and indicated that if the first contention of Dr. Chitale was not accepted we would hear the counsel for the parties on other points involved in the case. Having heard the counsel for the parties at some length we are of the view that the first point raised by Dr. Chitale is formidable and the appeal must succeed on this point alone. It is, therefore, not necessary to hear the parties on other points involved in the case.

10. In order to appreciate the contention of Dr. Chitale it will be pertinent to quote rules 3.26 (d) of the Punjab Civil Services Rules. Vol. I, Part I applicable to the present case (1980 Print) :

"Compulsory retirement

3.26 (a) Except as otherwise provided in other clauses of this rule, every Government employee shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years. He must not be retained in service after age of compulsory retirement, except in exceptional circumstances with the sanction of the competent authority in public interest, which must be recorded in writing :

Provided that the age of compulsory retirement of class IV Government empoyee shall be sixty years:

Provided further that a Government employee whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding on month attaining the age fifty-eight or sixty years as the case may be.

(b) ....

(c) The following are special rules applicable to P.W.D. Officers :—

(1) Except as otherwise provided n this sub clause, Government employees in the Haryana Service of Engineers Class I (B & R, LB and Electricity) nust retire on reaching the age of 58 ears, and may be required by the ompetent authority to retire on reaching the age of 50 years if they have not ttained the rank of Superintending Engineer.

(2) Subject to the requirements of his sub-clause as to re-appointment, the ompetent authority may, in special circumstances, which should be recorded n writing, grant an extension of service, ot exceeding three months, to a Chief Engineer.

(3) No Chief Engineer shall, without re-appointment, hold the post for nore than five years, but re-appointment o the posts may be made as often, and n each case for such period not exceeding five years as the competent authority may decide: Provided that the term of re-appointment shall not extend more han three month beyond the date on which the Government employee attains the age of 58.

(d) The appointing authority shall, f it is of the opinion that it is in the public interest so to do, have the absolute eight to retire any Government employee, other than Class IV Government employee by giving him notice of not less than three months in writing or three month's pay and allowances in lieu of such notice :—

(i) if he is in class I or class II service or post and had entered Government service, before attaining the age of thirty-five years, after he has attained the age of fifty years, and

(ii) (a) if he is in class III service or post, or

(b) if he is in class I or class II service or post and entered Government service after attaining the age of thirty-five years;

after he has attained the age of fifty-five years.

The Government employee would stand retired immediately on payment of three month's pay, and allowances in lieu of the notice period and will not be in service thereafter."

11. Rule 3.26 (c), which is a special rule applicable to Government employee in the Haryana Service of Engineers Class I, will govern the case of the appellant as the special overrides the general, Admittedly he was working as the Superintending Engineer for the last so many years on the date when the impugned order of his premature retirement was passed by the Governor. This Rule provides an immunity to the engineer who has attained the rank of Superintending Engineer. The appellant, therefore, get the protection of clause (1) of rule 3.26 (c).

12. Shri Harbans Lal appearing for the State of Haryana in reply refuses the contention raised by Dr. Chitale and

contends that the second part of Rule 3.26 (c) (I) only authorises the Secretary to Government in consultation with the Finance Department, to reduce the age of superannuation below 58 and above 50 with regard to class I officers of the PWD if they have not attained the rank of Superintending Engineers. This rule according to him is an enabling provision authorising the Secretary to Government to reduce the age of superannuation of all class I officers of the PWD if they have not attained the rank of Superintending Engineers and if they did so then all such officers who have attained 50 years should retire.

13. The contention of Shri Harbans Lal has absolutely no force for a variety of reasons :

Firstly, the heading 'Compulsory Retirement' is wide enough to include premature retirement within its fold. A Government employee in the Haryana service of Engineers has no right to continue in service if he has reached the age of superannuation which is 58 years in the case of engineers. He has perforce to retire unless he had been granted an extension. Likewise an engineer who has not reached the age of superannuation, but is made to retire prematurely, his retirement is as much a compulsory retirement as that of an employee who has attained the age of superannuation. It will, in our opinion not be correct to say that the age of superannuation in case of engineers who have not attained the rank Superintending Engineers has been reduced to 50 years. His contention, if accepte would result in an absurdity The inevitable result will be that all Executiv Engineers will have to retire at the ag of 50 which could never have been intended by the rule makers. The argumen of the learned counsel for the State is desperate one indeed. Shri Harban Lal tried to bring this case within th fold of rule 3.26 (d). This rule give the appointing authority the absolut right to retire any Government employe other than class IV Government employee by giving him notice of not less tha three months in writing or three months, pay and allowances in lieu of suc notice.

14. This rule is applicable to al Government employees but not t engineers of the P W.D. for whom ther is a special rule. In our opinion it is supplement to rule 3.26 (a) because i supplies the proceduce to be adopte in case of ptemature retirement of othe Government servents. We get suppor for our view from M. Narasimhacha v. State of Mysore (1960) I SCR 981 (AIR 1960 SC 247). That case involve the interpretation of articles 297 an 297 of the Mysore Services Regulations Article 294 provides that a Governmen servant in superior of inferior servic who has attained the age of fifty-five yea may be required to retire unless th Government considers him efficient an permits him to remain in service. Bu as the premature retirement of a efficient Government servant impose a needless charge on the State this rul should be worked with discretion.
Article 297 laid down that a Govern

ment servant in superior service who has attained the age of fifty-five years may at his opinion retire from service on a superannuation pension. It was sought to be urged in that case that article 297 gave option to the public servant whether he retires at that age or not. This Court interpreting article 297 held that this article was complementary to article 294(a) which gives government the power of keeping Government servants in service beyond the age of 55 years. Article 297 allows the Government servant, if the Government wants to keep him in service after 55 years to opt for retirement. It does not mean that it is entirely at the option of the Government servant to continue beyond the age of 55 years and the Government cannot retire him at that age if he does not exercise the option.

15. That decision involved the interpretation of different rules but the reasoning adopted in that case is applicable in the construction of rule 3.26 (d) of the Punjab Civil Services Rules.

Shri Harbans Lal in support of his contention referred to the old corresponding rules. The relevant portion of the old rules is quoted hereunder :

"Rule 3 26 of C. S. R. (Pb) 1941 Edition. Compulsory Retirement.

3. 26 (a) Except as otherwise provided in the other clauses of this rule the date of compulsory retirement of a Government servant, is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of competent authority on public grounds, which must be recorded in writing, but he must not be retained after the age of 60 years, except in very special circumstances.

(b) — — —

(c) The following are special rules applicable to particular services : —

(i) — — —

(ii) Except as otherwise provided in this sub-clause Civil Engineers of the Public Works Department must retire on reaching.

Rule 3.26 of Punjab C.S.R. Vol. I part I, 1953 Edition. Compulsory Retirement.

3 26 (a) Except as provided in other clauses of this rule, the date of compulsory retirement of a Government servant other than a Class IV Government servant, is the date on which he attains the age of 55 years. He must not be retained in service after the age of compulsory retirement, except in exceptional circumstances with the sanction of competent authority on public grounds, which must be recorded in writing.

(b) ……………

(c) The following are special rules applicable to P.W.D Officers :-

(1) Except as otherwise provided in this sub-clause, Government servants in the Punjab Service of Engineers Class I (B & R, T. B. and Electricity) must retire on reaching the age of 55 years, and may be required by the competent authority to retire on reaching the age

of 50 years, if they have not attained the rank of Superintending Engineer.

Rule 3.26 of Punjab Civil Services Rules, Volume I, Part I, 1963 Edition. Compulsory Retirement.

3.26 (a), Except as provided in other clauses of this rule, the date of compulsory retirement of a Government servant other than a Class IV Government servant, is the date on which he attains the age of 58 years. He must not be retained in service after the age of compulsory retirement, except in exceptional circumstances with the sanction of competent authority on public grounds, which must be recorded in writing.

(b) ....

(c) The following are special rules applicable to P.W.D. Officers :—

(1) Except as otherwise provided in this sub-clause, Government servants in the Punjab Service of Engineers, Class I (B & R, I B. and Electricity) must retire on reaching the age of 58 years, and may be required by the competent of authority to retire on reaching the age 50 years if they have not attained the rank of Superintending Engineer.

Clause (d) inserted in rule 326 voide Notification No. 4118-3 FR-74/24837 dated 12th July 1974.

3.26 (d) The appointing authority may, if it is of the opinion that it is in the public interest so to do, retire any Government servant, other than a Class IV Government servant, other than a Class IV Government servant, by giving him a notice of not less than three months in writing :—

(i) if he is in class I or class II service or post and had entered Government service before attaining the age of thirty five years, after he had attained the age of fifty years, and

(ii) ... ."

17. A bare perusal of the old rules will indicate that an engineer who has attained the rank of Superintending Engineer in the P.W.D. (B & R Branch) had always the immunity ever since the provision for premature retirement came into force. The old corresponding rules do not improve the position for the State. They rather support the contention of the appellant.

18. We enquired from Shri Harbans Lal whether any other engineer in the Engineering Service of P.W.D who had attained the rank of Supertending Engineer had ever been prematurely retired and he frankly admitted that there has been no such case.

19. For the foregoing discussion the appeal must succed. It is accordingly allowed with costs and the order of the High Court dated 5th January, 1984 is set aside. The writ petition stands allowed and the order of premature retirement dated 18th December, 1981 is quashed. The appellant shall be deemed to be in continuous service. He is entitled to his salary, emoluments and other consequential benefits to which he would have been entitled to if he had not been prematurely retired

Appeal allowed.

Report No. 09 p. 01

O. Chinnappa Reddy
Judge
Supreme Conrt of India

OBSERVATION

(A) Employees of Andhra Pradesh Govt.—Age of superannuation reduced from 58 to 55 years—Govt. realising injustice caused, immediately reversing its decision —Ordinance restoring age of superannuation to 58 years however passed seme time after—Employees retiring due to reduction in superannuation age before date of passing of Ordinance excluded from benefit of extended age of superannuation under Ordinance—Held, provisions of Ordinance arbitrarily classified Govt. employees—Constitution of India, Arts 14, 16—A.P. Public Employment (Regulation of Age of Superannuation) Act (23 of 1984), S. 3—A.P. Public Employment (Regulation of age of Superannuation) Second Amendment Ordinance (24 of 1984), Cl. 3(1)—A.P. Public Employment (Regulation of Age of Superannuation) Amendment Act (3 of 1985), S. 4

(A) Prospective statute—Irrational classification resulting out of its prospectiveness—Court can remove arbitrariness although it may amount to making statute retrospective—Constitution of India, Arts 14, 16.

(c) Govt. Servant—Order to reinduct—Reinduction detrimental to public interst —Like private employers Govt. can also be ordered to pay back and future wages —Constitution of India, Art. 311. (Para 21)

(D) Res judicata—Writ petition similar to earliar one filed—Earlier petition dismissed in limine—Dismissal of earlier petition would inhibit discretion but not jurisdiction of Supreme Court to hear the subsequent Writ (Obiter)—Constitution of India, Art. 32—Civil P.C. (5 of 1908), S. 11. (Para 23)

(E) Necessary Parties—Writ petition by Govt. employees challenging Ordinance issued by Govt.—Relief claimed against Govt. and not against individuals—Failure to implead all affected employees would not make petition unmaintainable (Obiter). (Civil P.C. (5 of 1908), O. 1, R. 10)—Constitution of India, Article 32. Para 23)

OBSERVED BY

O. Chinnappa Reddy, V. Balakrishna Eradi And V. Khalid, Hon'ble Judges Supreme Court of India.

IN

Writ Petns. Nos. 5447-5546; 5547-5574; 5586-5662 etc. etc. of 1985 and SLP (C) No 8990, 9099 and 9110 of 1985 and C.M.P. Nos. 24003 and 24003A of 1985 (In W.P. No. 5154 of 1985) and C.A. No. 2508 of 1985, decided on 19-8-1985 between B. Prabhakar Rao and others, etc., Petitioners v. State of Andhra Pradesh and others etc. etc. Respondents.

O. Chinnappa Reddy
Judge
Supreme Court of India

TEXT

Chinnappa Reddy, J. :— Tossed about by the Executive, the Legislature and, we are sorry to say, by us (the Judiciary) too, and therefore, totally bewildered, several civil servants, employees of public sector corporations and teachers working under various local authorities are now before us wanting to know where they stand and to what justice and relief they are entitled. In Feb., 1983, the Government of Andhra Pradesh decided to reduce the age of superannuation of its employees from 58 to 55 years. The Government also issued directives to local authorities and public corporations under its control to do likewise. The age of superannuation was in fact 55 year to begin with. But earlier, in the year 1979, the Government of Andhra Pradesh had raised the age of superannuation to 58 years, presumbly, because of the increased average human longevity in India, the better health and medical facilities available, the improved standard of living the usefulness in service of experienced employees, the employment situation and potential, and such other relevant considerations. But in February 1983 the Government decided to reduce the age of superannuation. In order to give effect to their policy of reversal i.e. the policy of reducing the age of superannuation from 58 to 55, the Government amended Rs. 56 (a) of the Fundamental Rules and R. 231. of the Hyderabad Civil Services Rules by substituting the figure '55' for the figure '58' and by making a special provision that those who had already attained the age of 55 years and were continuing in service beyond that age on 8-2-1980 shall retire from service on the afternoon of 28-2-1983. The notifications by which these amendments were carried out were followed by another notification dated 17-2-1983 deleting the proviso to Rule 2 of the Fundamental Rules which protected a civil servant against a change of his conditions of service to his detriment after he entered service. This was followed by the promulgation of the Andhra Pradesh Ordinance No 5 of 1983 regulating the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the State of Andhra Pradesh and the officers and servants of the High Court of Andhra Pradesh. Clause 10 of the Ordinance provided that every Government employee, not being a workman and not belonging to Last Grade Service shall retire from service in the afternoon of the last day of the month in which he attains the age of fifty-five years.' In the case of Government employees belonging to the Last Grade Service, it was provided that the shall retire from service on the afternoon of the last day of the month in which they attain the age of sixty-years. Clause 18 (1) provided that the proviso to R. 2 of the Fundamental Rules shall be and shall be deemed always to have been omitted. Now immediately after the notifications reducing the age of super-annuation from 58 to 55 were issued, a large number of Government employees, employees of public sector corporations and teachers working under various authorities local filed writ petitions in this Court as well as in the High Court of Andhra Pradesh challenging the vires of the provisions reducing the age of superannuation After promulgation of the ordinance they were permitted to amend the petitions to question the appropriate provisions of the ordinance too. The petitions in this Court were heard at great length for several days by Chandrachud, C.J., Pathak, J. and S. Mukharji, J. and Judgment was reserved on 27-7-83. The Judgment was however pronounced only on January 18, 1985. The impugned provisions were upheld and all the writ petitions were dismissed. In the meanwhile much water had flown under the bridge. There were agitations and agreements. There were twists and turns of political power. There were amendments to the legislation, once more raising the age of superannuation. Learned counsel inform us that the subsequent events were brought to the notice of the court and that a petition was also filed to amend the writ petitions and to raise additional grounds. The Court however refused to take notice of the subsequent events and proceeded to pronounce their judgment with reference to a situation which obtained several months ago and which situation stood considerably altered and even become unreal by the subsequent march of events. It was a great pity. Much confusion and heart-burning might have been avoided, as we shall presently see.

2. It is now necessay to mention in greater detail the events that followed the reduction of the superannuation from 58 to 55 years. We referred to agitations and agreement. It appears that soon after the reduction of the age of superannuation, their was a State-wide agitation by affected employees and on August 3, 1983, an agreements was arrived at between the Government of Andhra Pradesh and the Action Committee of Employees and workers in Andhra Pradesh.

3. Clause (1) of the Agreement is important and may be usefully extracted It is as follows :

"All provisions relating to Ordinance 5 of 1983, except those relating to the age of superannuation, will be deleted at an early date. Proviso to F. R 2 will be restored in respect of all matters except the age of superannuation retrospectively. The provisions of the ordinance relating to the age of superannuation will also be removed after the judgment of the Supreme Court, provided that such removal will not adversely affect the right of Government as determined by the Supreme Court judgment to fix the age of superannuation.

If the Supreme Court uphold the power of the Government to reduce the age of superannuation without referred to the provisions in the ordinance and F. 2., the entire ordinance will be scrapped and F.R. 5 will be restored."

This clause of the agreement shows that while the Government was anxious to obtain a judgment of the Supreme Court securing their right to fix the age of superannuation' they had also realised that grave wrong and injustice had been done to its employees by their earlier action in reducing the age of superannuation. They were anxious to undo the wrong and do justice to their employees while preserving their own power to act in the future, if and when necessary. The apparently was the reason why the Government agreed to scrap the whole of the ordinance if the Supreme Court upheld the power of the Government to reduce the age of superannuation and further agreed to delete provision relating to the age of superannuation in the ordinance, after the judgment of the Supreme Court was pronounced, Cl. (1) of the Agreement expressly provides that proviso to F. R. 2 will be restored in respect of all matters, except the age of superannuation retrospectively. It is then followed by the sentence. The provisions of the ordinance relating to the age of superannuation will also be removed after the judgment of the Supreme Court'. The clear implication appears to be that the provisions of the ordinance relating to the age of superannuation will also be removed in the same manner as the proviso to Fundamental Rule 2 i.e. introspectively. Otherwise the agreement would make no sense. Those attaining the age of 55 years before judgment was pronounced would just have to walk out while those who did not would stay on. Surely their fate was to hang on a date.

4. The agreement, however, contained a further curious stipulation that it was not to be placed before the Supreme Court either by the Government or by the employees. Perhaps the stipulation was intended to prevent the Supreme Court from abstaining from pronouncing upon the power of the Government to reduce the age of superannuation. Quite obviously the Agreement contemplated that the judgment of the Supreme Court would be forthcoming very soon. But that was not to be.

5. There was considerable discussion at the Bar whether the agreement contemplated and stipulated restoration of 58 years as the age of superannuation if the power of the Government to reduce the age of superannuation was upheld by the Supreme Court. The agreement appears to us to be clear and categoric and a reference to the pleadings demonstrates that the Government also never doubted the employees' interpretation of the agreement. In para 2(h) of the petition Na. 3420-26 of 1985, the petitioners asserted :

"It is pertinent to point out that in the interrengum between the Petition being admitted in this Hon'ble Court and the judgment being delivered a State-wide agitation took place in Andhara Pradesh State Government in June and July, 1983. The agitation was for the purpose of demanding inter alia that the retirement age of the State Government employees be restored to 58 years. Ultimately, on 3-8-1983, an agreement was arrived at between the State Government and the Action Committee of the Employees and workers in

Andhra Pradesh by which it was agreed that the State Government would restore the age of retirement to 58 years if the Supreme Court upheld the State Government's power to reduce the age of retirement. The said agreement which was a detailed agreement entered into the between State of A.P. on behalf of whom the negotiations were conducted by the then Chief Secretary Shri G.V. Ramkrishna I.A.S. and the Action Committee of the employees and workers which Action Committee represented 39 service organisation."

To this the answer of the Government in their counter was :

"I state with respect to paragraph 2 that this paragraph deals with narration of facts regarding the circumstance under which the age of retirement was enhanced and the recommendations of the Pay Revision Commission etc. Hence they require no comments. It is respectfully submitted that all these relevant facts have been taken into consideration by the Supreme Court while rendering the judgment upholding G.O. Ms. No. 36, dt. 8-2-1983 In its judgment since reported in (1985) I SCC 523 : (AIR 1985 SC 551). Hence there is no necessity to traverse those facts once again herein," and

"I further state that it is not proper for the petitioner to have filed the agreement reached between the employees Union and the State of Andhra Pradesh as Annexure to the writ petition. Under the last clause of the agreement reached between the Employees Union and the State of Andhra Pradesh that the agreement shall not be placed before the Supreme Court by the Government or the members of the employees associations. Contrary to the provisions of the agreement the petitioners have chosen to file this agreement in support of their case and pleaded for enhancement of the age of retirement."

The Government's objection was not to the interpretation placed upon the agreement by the parties but to its being brought to the notice of the Court.

6. The Andhra Pradesh Legislature enacted the Andhra Pradesh Public Employment (Regulation of Age of Superannuation) Act No. 23 of 1984 making it applicable to all persons appointed to public services and posts in connection with the affairs of the State all officers and other employees working in any local authority, whose salaries and allowances were paid out of the Consolidated Fund of the State, all persons appointed to the Secretariat Staff of the Houses of the State Legislature, and all officers or employees whose conditions of service were regulated by rules framed under the proviso to Art 309 of the Constitution immediately before the commencement of this Act Sub-section (3) of S. 1 stated clause (i) of S. 7 shall be deemed to have come into force on the April 29, 1983. Section's 3 (1) and (2) were as follows :

"3 (1). Every Government employee, not being a workman and not belonging to Last Grade Service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-five years.

(2) Every Government employee not being a workman but belonging to the Last Grade Service shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years."

Explanation II (b) to S 3 was to the following effect :

(b) a Government employee who attained the age of superannuation but who was allowed to continue to hold the post beyond the date by virtue of stay order of a Court, shall be deemed to have ceased to hold the post and relieved of his charge from the date of the judgment dismissing his petition, irrespective of whether the charge of the post was handed over or not as prescribed in any rule or order of the Government for the time being in force."

On August 23, 1984 the Andhra Pradesh Public Employment (Regulation of Age of Superanuation) Act No. 23 of 1984 was amended by the promulgation of Andhra Pradesh Ordinance No. 24 of 1984 providing that in S. 3 (1) of the Act and in Explantion II (a), the words 'fifty-eight years' shall be substituted for the words 'fifty-five years'. This was obviously done to give effect to the agreement of August 3, 1983 and to fulfil the promise held out therein that age of superannuation would be restored to 58 years. Clause 3 (1) o the Ordinance is the much dispute provision and it has therefore, to be extracted in full. It is as follows .

"3 (1) The provisions of thi Ordinance shall not apply to persons who attained the age of superannuatio in pursuance of the notifications issue to G.O. Ms No. 36 Finance an Planning (Finance Wing–F.R.I) Department, dated the 8th February, 1983 or in pursuance of the provisions of th Andhra Pradesh public Employmen (Regulation of Age of Superannuation Act, 1984, as in force prior to th commencement of this Ordinance"

Andhra Pradesh Ordinance No. 24 o 1984 was replaced by Act No. 3 of 1985 By S. 2 of the Amending Act, the word 'fifty-five years' were substituted by th words 'fifty-eight years' in S. 3 (1) an Explanation II (a) of the principal Act Section 4 of the Amending Act whic is more or less on the same lines as Cl 3 (1) of the Ordinance says :

"3 (I). The provisions of S. 2 o this Act shall not apply to persons wh attained the age of superannuation i pursuance of the notifications issued i G.O. Ms. No. 36 Finacce and Planning (Finance-Wing-F. R. I) Department, dated the 8th February, 1983, o in pursuance of the provisions of Andhra Pradesh Public Employment (Regulatio of Age of Superannuation) Act, 1984, as in force prior to the commencemen of this Act "

7. No explanatory statement accompanying Ordinance No. 23 of 1984 was brought to our notice. The Statement of Objects and Reasons of Act No. 3 of 1985 was however placed before us but it is not helpful to ascertain the reasons which led the legislature to restore the age of superannuation to 58 years. It merely states that the Government considered it necessary to raise the age of superannuation from 55 to 58 years-" But we are not altogether helpless. Where internal aids are not forthcoming, we can always have recourse to external aids to discover the object of the legislation. External aids are not ruled out. This now a well settled principle of modern statutory construction. Thus 'Enacting History' is relevant. "The enacting history of an Act is the surrounding corpus of public Knowledge relative to its introductio nito Parliament as a Bill, and subsequent progress through, and ultimate passing by, Parliament. In perticular it is the extrinsic material assumed to be within the contemplation of Parliament when it passed the Act". Again "In the period immediately following its enactment, the history of how an enactment is understoot forms part of the contemporancea expositio, and may be held to throw light on the legislative intention. The later history may, under the doctrine that an Act is always speaking, in the light of development from time to time. "Official statements by the Government department administering an Act, or by any other authority conncerned with the Act may be taken into account as persusive authority on the meaning of its provisions-" Justice may be blind but it is not to be deaf.

Judges are not to sit in sonnd-poof rooms

8. Committee reports, Parliamentary debates, policy statements and public utterances of official spokesmen are of relevance in statutory interpretation. But 'the comity, the courtesy and respect that ought to prevail between the two prime organs of the State, the legislature and the judiciary', require the courts to make skilled evaluation of the extratextual material placed before it and exclude the essentially unreliable. "Nevertheless the court, as master of its own procedure, retains a residuary right to admit them where, in rare cases, the need to carry out the legislator's intention appears to the court so to require." No rule prevents the court from inspecting in private whatever materials it thinks fit to ensure that it is well informed, whether in relation to the case before it or generally. Where these materials constitute publicly available enacting history, the court takes judicial notice them " "The court has an inherent power to inspect any material brought before it." (Francis Bennign : Statutory Interpretation) This is to enable the court to determine

whether the material is relevant to the point of construction in question, and if so whether it should be admitted. This has to be done with a degree of inhibition and an amount of circumspection.

9. Here, the facts speak for themselves. Res ipsa loquitur. The history and the succession of events, the initial lowering of the age of the superannuation, the agitation consequent upon it and the agreement that followed the agitation clearly indicate that the object of Ordinance No. 23 of 1984 and Act No. 3 of 1985 was to undo the mischief or the harm that had been done by the lowering of the age of superannuation from 58 years to 55 years and to restore the previous position. Quite obviously, it was not a case of change of policy consequent on change of social circumstances. It was a case of a change of policy to set right immediately a recent wrong perpetrated by a well intentioned but perhaps ill-thought measure. It was not at all a case of reversal of policy becauee of changed circumstances. A reference to the note file which was made available to us by the learned Advocate Geaeral of Andhra Pradesh at our instance shows that it was after a careful consideration of the representations made by the various service associations in regard to the restoration of the age of superannuation to 58 years that the Government resolved to restore the age of superannuation to 58 years. In the counter, the Government appeared to take the stand that the Governments of the States of Karnataka and Rajasthan had raised the age of superannuation to 58 years and the Government of Andhra Pradesh wanted to fall in line. It was a wholly inaccurate statement. There is no reference in the note fite or elsewhere, except for the first time in the counter, to the circumstance that two other State Governments has raised the age of superannuation and the Andhra Pradesh Government had accepted their wisdom. The statement in the counter must be ignored. A reference to the pleadings is revealing, if not starting. In Writ Petition Nos. 3420/3427/85 in paragraph 5, the petitioner averred.

> "In fact Shri N. T. Rama Rao, Chief Minister himself admitted that he was Misguided and Misled by the then Finance Minister and the Chief Secretary when his Government took the decision to reduce the age of retirement. His press conference dated 25-9-1984 was reported in the Deccan Chronice" as follows :

> "Chief Minister N. T. Rama Rao today announced that his government would retain the age of superannuation of the Government employees at 58 years as decided by the short-lived Bhaskara Rao Ministry.

> Briefing newsmen after the cabinet meeting this afternoon, Mr Rama Rao said the Cabinet had reviewed the decision of the previous Government to raise the age of superannuation from 55 years to 58 with effect from August 23, 1984.

The Chief Minister charged that Mr. N. Bhaskara Rao, the then Finance Minister and the then Chief Secretary Mr. B. N. Raman had misled him when is Government decided to reduce the ge of superannuation from 58 to 55. Both have not raised any objection to he proposal. Despite knowing well that he 'unpopular' move would be detrimental to the Government, they had allowed it go with the evil intention of disrediting him, he alleged.

Mr. Rama Rao said it was not his ntention to hurt the interests of any section of the people and the Goverment mployees constituting a sizeable number who had voted his party to power. 'However, it is not possible for the Government to concede the request of hose who had already retired", he obseved."

The said report has never been deied or resiled by the Chief Minister.

In answer, the averment was not denied. The deponent of the counterffidavit stated :

"I state with respect to paragraph 5 hat it is not open to the petitioner to ely on paper cuttings in support of their ontention unless otherwise they are proved apart from the fact that the tatement in paper cuttings are in no way advance the case of the petitioner."

This can hardly be considered to be denial of what was said in paragraph 5 of the petition. We must therefore, proceed on the basis that the Chief Minister (Shri N.T. Rama Rao) did allege that when the Government took the decision to reduce the age of superannuation, he was 'misguided and misled' by his Finance Minister and the Chief Secretary. It may be a sorry confession to make on the part of a Chief Minister, especially when it was a momentous decision involving the lives and future of thousands of employees. One wonders how a decision concerning the lives and the future of civil servants, who all their lives in the past, had loyally served the Government, could have been taken in such a hasty and haphazard fasion. One would expect such a decision to be taken after a full investigation into the multitudinous pros and cons, after collection of all pertinent data and after deep consideration of every aspect of the question. But there we have a statement attributed to the Chief Minister that he was "misled and misguided by the Finance Minister and his Chief Secretary. Sorry confession, it may be, but a frank and courageous admission it was, exposing him to criticism and (illegible) ridicule. It does require a sturdy, spirit to own a mistake".

10. During the pendency of the Writ petition in this Court, several employees of local authorities etc. obtained orders of stay from the High Court and were continuing in service on the dates when the judgment of the Supreme Court was pronounced. After the pronouncement of the judgment of the Supreme

Court, the authorities that be have sought to give effect to the provisions of the Act and the Ordinance by seeking to throw them out on the ground that they had completed 55 years of age during the interregnum between February 28, 1983 and August 23, 1984. Some others who had completed 55 years, between February 28, 1983 and August 23, 1984 but who had not completed 58 years sought re-entry notwithstanding the raising of the age of superannuation from 55 years to 58 years. Their re-entry was sought to be resisted on the basis of Cl 3 (1) of the Ordinance and S. 4 (1) of the Amending Act. Those employees who were sought to be removed from service or who were denied re-entry into service on the ground that they had attained the age of 55 years between February 28, 1933, and August 23, 1984 have once again invoked the jurisdiction of this Court and sought appropriate writs from this Court to continue or to reinstate and continue them in service until they attain the age of 58 years. They are the petitioners petitions in Writ Petitions Nos. 3203,34-13-3419,3420-3426 etc. etc. of 1985. They sought interim orders from this Court.

11. On 23-4-85 interim directions to the following affect were issued by Desai and khalid, JJ :

"(I) From amongst those Government servants and servants of local and other authorities governed by the decision of Government of A. P. reduction of age of retirement from service from 58 years to 55 years, whc continued in service or continued to holc the post on April 1, 1985 for any reasor including the grant of interim relie by Courts and who are removed fron that post after that date shall be reinducted and put back in the post fron where he/she was removed.

(2) Those Government servant and others enumerated in No. (1) here and who are today in service and ar likely to be removed on account of th reduction in age of superannuatio notwithstanding restoration of highe age, whatever be the case, shall continu in service till further orders.

(3) Those Government servant and others enumerated in No. (1) her who were in service prior to April 1 1985 and who are removed from servic on account of reduction in age, shall b reinducted in service, if the posts fron each one was removed is still vacan or someone in holding a temporar charge.

(4) These directions shall be carried out and given effect to within on week from today.

(5) These directions will also cove those Government servants who ar similarly situated but filed the SLP and WPs.

(6) Government servants referre to in No. (1) will also comprehen members of State Judicial Service."

The matter was mentioned again on two occasions for clarification and the following orders were then made by Tulzapurkar, Desai and Sen, JJ. The order made on May 6, 1985 said :

"We do not see any ambiguity in Cl. 3 of the order dated 23rd April, 1985. It is directed that Cl. 3 of the order dated 23rd April, 1985 should be implemented to the extent that pomotions made to the posts which are held by the officers will be made under Rule 37 by temporary appointments and the Chief Secretary and other two Senior Secretaries will examine the question as to how many such vacancies could be filled and it is further directed that from out of the petitioners one who has the longest service will be selected. The order will be carried out within two weeks from today. This is without prejudice to the vacancy clause. All these appointments will be subject to the result of these petitions."

The order made on May 7, 1985 said :

"We do not see any ambiguity in clause 3 of the Order dated 23rd April, 1985. It is directed that clause 3 of the Order dated 23rd April, 1985 should be implemented to the extent that the posts from which the employees were moved are still vacant or where such post is held temporarily by others on promotion under Rule 37 of the A. P. State Subordinate Service Rules. The Chief Secretary and two other Senior Secretaries will examine the question as to how many such posts could be filled and it is further directed that in cases where more than one person has retired from a post, the person having the longest service should be selected. The Order will be carried out within two weeks from today. All these appointments will be subject to the result of the petitions."

These interim orders were made under the misapprehension that all so-called promotions could only be made under Rule 37 whereas whenever a promotion was made from a lower service to a higher service, it was not called a promotion but was styled as an appointment and was made under Rule 10 was Since Rule 10 was not mentioned in the orders, persons who had been 'promoted' and appointed under Rule 10 claimed that they could not be displaced. Some others though promoted under Rule 37 claimed that they had in fact been promoted regularly after a proper selection by the Departmental Committee but that according to the practice prevailing in Andhra Pradesh, their orders of promotion mentioned that they were promoted temporarily, though in fact they had been promoted regularly. Many such persons, claiming to have been appointed regularly. Many such persons, claiming to have been appointed under Rule 10 or claiming to have been promoted regularly notwithstanding the mention of Rule 37 filed Writ Petitions Nos. 5447-5546 of 1985 etc. etc. questioning the orders of reversion with which they were faced consequent on the interim directions given by Desai and Khalid, JJ.

During the vacation, R. B. Misra, j. stayed the orders of reversion passed by the Government in order to reinduct the retired employees. The interim orders granted by R.B. Misra, J. appeared to conflict with the earlier interim orders granted by this Court. When all the interim applications came before us a few days back, we directed that all the writ petitions may be placed before us for final disposal and that is how the matters are now before us

12. Before referring to the submissions of the parties on the principal question of discrimination and arbitrariness, it is necessary to ascertain the exact factual situation in regard to certain other matters, besides those to which we have already referred, First in regard to the question whether the vacancies arising consequent on the application of the reduced age of superannuation have been filled and if filled, whether they have been filled on a regular or temporary basis? in Writ Petition No. 3170/85, a Deputy Secretary to the Government of Andhra Pradesh speaking for the Government of Andhra Pradesh swore to a counter-affidavit in May 1985 in which he stated:

"I state with respect to paragraph 8, that it is not correct to state that only few vacancies have been filled on temporary basis on the specific condition of review and revision on the basis of outcome of the judgement in the Writ Petitions filed by the employees due to the retirement at the age of 55 years pending in this Hon'ble Court. It is with rules on regular basis. It is only in few cases, temporary promotions have been effected pending writ petitions. It is submitted that Annexurs I to this of superannuation the Government took every step to see that most of the vacancies have been filled up in accordance that few vacancies have been filled up. Consequent on the reduction in the age submitted that it is wholly untrue to say counter-affidavit gives particulars regarding the vacancies that arose due to the reduction in the age of retirement on 28-2-1983 and the vacancies filled up and the vacancies existing. There are very few vacancies in the lower echelons. I also submit that the existing few vacancies are due to administrative delay or vacancies that arose later after originally filling the vacancies."

In writ Petitions Nos. 5447-5546/85, there was a complete volte face and the very same Deputy Secretary speaking again for the Government of Andhra Pradesh said :

"In so far as the first point is concerned in none of the cases there were regular promotions. All the promotions were officiating/temporary/ad hoc which would be clear from orders of promotion, some of which have been produced by the petitioners themselves. The promotions were either subjet to the result of the writ petitions then pending in this Honourable Court challenging reduction of retirement age from 58 to 55 years, or some other proceedings relating to inter se seniority pending either in this Honourable Court or in the High Court or in the administrative Tribunal, or because of the pendency of finalisation of seniority lists and consequent review of promotions under the State Reorganisation Act. Further the writ petitions questioning the reduction of age of retirement from 58 to 55 in G.O. Ms No. 36, dated 8-2-83 were heard and judgment was reserved on 27th July, 1983. Since the judgment was reserved, the judgment was expected at any moment. Hence the Government were making only officiating/temporary promotions under Rule 37. Under the circumstances it was not possible to make regular appointments/promotions. Therefore, the petitioners were rightly reverted in accordance with the directions of the Honourable Court dated 6-5-1985 and 7-5-85. There was no question of either giving them any notice or hearing before the orders of the reversion are passed, as in terms of R. 37 (dd), they could be reverted without any notice or hearing"

"Persons holding the posts under R. 10 have no right to the posts and their appointments/promotions were purely temporary/ad hoc".

"Hence I state that the petitioners continue to be ad hoc promotees under Rule 37 and not regular employees as claimed by them."

and :

"Admittedly, the petitioners were promoted under Rule 37 consequent to the vacancies which arose due to the retirement of several persons at the age of 55 years.

The Government never intended to appoint them on regular basis pending writs and judgment before the Supreme Court. In case the promotions were effected regularly legal complications will set in the event of the judgment of the Supreme Court going against the State Government deliberately made R. 37 promotions so that in the event of the judgment going adversely against the State Government, there may not be any difficulty in reverting Rule 37 promotees and reinducting the employees affected by G.O. Ms. No. 36 dated 8-2-83. Fortunately, the judgment of the Supreme Court comes in favour of the State Government."

It is amazing that the same Deputy Secretary to the Government, representing the same Government, should have sworn to two such contradictory affidavits, reveals a total sense of irresponsibility and an utter disregard for veracity. It shows that the deponent had signed the affidavits without even reading them or that he signed them to suit the defence to the particular writ petition without any regard for truth. In either case, it is reprehensible and totally unworthy of the spokesman of a Government and most unflattering to the Government on whose behalf he spoke. We would have contemplated severe action against the deponent, had we not the feeling that the responsibility for his statements lies with undisclosed higher echelons and we need not make a scapegoat of him. In fact, in a case like this involving the entire body of

Government servants in Andhra Pradesh, we would have expected the Chief Secretary or a Principal Secretary to file the counter. But they have chosen to keep themselves back.

13. However we have a duty to discover the truth. We think that the truth is what is stated in the counter-affidavit in Writ Petitions Nos. 5447-5546/85. The counter-affidavit itself gives good reasons why the promotions/appointments were made on a temporary basis and the reasons are acceptable. The statements in the counter-affidavit in writ Petition No. 5447-5546/85 are supported by the findings of the Committee which was appointed by the Government under the interim orders of this Court. This Committee consisted of the Chief Secretary and two senior Secretaries and it was asked to examine the question of the availability of posts for reinduction of retired employees. The findings of Committee were mentioned in the counter-affidavit in writ Petition No. 5447-5546/85 and this is what was said:

"The Committee constituted under G.O. Ms. No. 205, dt. 9-5-1985 has completed its task of determining the number of vacancies for which retired employees can be reinducted as per the directions of this Honourable Court. Here below is given an abstract of the position as emerged. Total number of persons retited from 28-2-83 to 23-8-1984 due to reduction of age of retirement from 58 to 55 is 15, 529. Of these people, 8, 928 are eligible for reinduction as they are below 58 years. Th Committee found that 2,770 posts ar vacant and that 1751 persons have to b reverted as they were holding the post on temporary promotions under R. 37 Thus, the total number of vacancies t which retired persons could be reinducted is 4, 521."

14. It was said that it was a practice in the State of Andhra Pradesh t make even regular appointments an regular promotions under Rule 10 an Rule 37 only and therefore, the mer fact that Rule 10 or Rule 37 was mentioned in an order of appointment o promotion would not necessarily mak the appointment or promotion tempor ary. Such appointments or promotions if made after going through the regula process or selection were to be conside red as regular and not temporary notwithstanding the mention of Rule 10 o Rule 37. But here as pointed out i the counter, there was a special situation immediately after the age of superannuation was reduced, writ petition were filed in the Supreme Court and i the High Court and there was considerable agitation by the employees. Th entire situation was fluid as it were and there was good reason for the Govern ment to make the appointments and pr motions on a purely temporary basis and that was what they did. That the Departmental Committees recommended the temporary appointments and promotions makes no difference since eve temporary appointments and promotions are made on the recommendation of the Departmental Promotion Committee

This is clear from the counter-affidavit in writ petitions No. 5447-5546/85 where it is stated as follows in pargraph IV B :

"In certain cases, the promotions were given on the basis of the recommendations of the Departmental Promotion Committee but that does not mean that their promotions were regular. The Departmental Promotion Committee also makes recommendations for temporary appointments/promotions otherwise it will offend Arts. 14 and 16 in case all eligible-candidates are not considered for promotion even though the promotion is either officiating/temporary. There, the mere selection by the Departmental Promotion Committee does not make their promotions regular Promotion or posting after completion of training does not make the promotions regular. The promotion orders of the petitioners promoted under Rule 37 clearly show that their promotions were purely temporary."

15. It is in this setting and background of facts that we are required to consider the submissions made to us. The submission made by Sarvasri K. K. Venugopal, V.M. Tarkunde and F. S. Nariman, who appeared for the employees who attained the age of 55 years between 28-2-83 and 23-8-84, was, that the classification of these persons as a separate group for the purpose of excluding them from the benefit of the redressal of the wrong done to the employees and the relief given to them by the amending Ordinance and the Act, was an unreasonable classification having no nexus whatsoever with the object of the legislation. They urged that every person who was in Government emploment on 28-2-83 was hit by the reduction of the age of superannuation from 58 to 55 years and when, it was realised that a grievous wrong had been done which it was necessary to set right by reversing the policy and such a policy decision was in fact soon taken, there was no reason to postpone effect being given to the reversal of policy toan uncertain date, namely the pronouncement of the judgment by the Supreme Court and thereby to exclude from the benefits of the change of policy that group of persons who had the misfortune of attaining the age of 55 years between the two dates. The learned counsel pointed out that the decision to reverse the policy having been taken, the uncertain date of pronouncement of judgment was an irrelevancy in fixing the date from which to give effect to the policy. In the event, the Government also did not await the pronouncement of the judgment but came forward first with the Ordinance and then with the Act. Therefore, the learned counsel urged, by merely giving them the appellation 'retires' as the Government had done in this case, the group of persons who had attained the age of 55 years before the delayed date of giving effect to the reversal of policy could not be discriminated against The question according to the learned counsel, was not one of retrospectivity at all, but one whetner when making a legislation to right a wrong or remedy a mischief, a

group of persons who had also been wronged and suffered the mischief could be excluded by the mere mechanics of delayed legislation. Shri Venugopal further submitted that several persons who are continuing in service by virtue of orders of stay obtained from the High Court were also sought to be sent away by the Government on the ground that had they not obtained the orders of stay, they would have retired from service on having attained the age of 55 years. This he urged was patently unreasonable. On the other hand, it was urged by the learned Advocate General of Andhra Pradesh, who appeared for the Government of Andhra Pradesh, Shri Shanti Bhushan, Shri Govindan Nair, Shri Parmeshwar Rao, Shri H. S. Guru Raja Rao and Shri Kanta Rao, learned counsel who appeared for the officers who were promoted in the vacancies created by the retirement of those who had attained the age of 55 years, that there was no discrimination whatever and that what the Government had done was merely to classify those employees who had ceased to be in service or who should have ceased to be in service and refused to apply the increased age of superannuation to them. It was said that having gone out of service, there was no question of their being eligible to the increased age of superannuation and therefore, the classification was perfectly reasonable. It was also urged that appointments and promotions were made subsequent to the reduction of the age of superannuation on regular basis and those appointments and promotions could not be disturbed. We were told that interfernce by us at this stage would lead to adminstrative disorder, disaster and chaos. We would like to mention here that the learned Advocate General of Andhra Pradesh as well as the other learned counsel who appeared on either side presented their respective points of view very fairly and with moderation. The task of the learned Advocate General was particularly difficult as he stood between the devil and the deep sea as it were.

16 A situation such as the one before us had never presented itself to the court previously Make this case a precedent for justice say one side; let this not be the first say the other. We have had cases where the age of supernnuation had been raised from 55 to 58 years; we have had cases where having earlier raised the age of superannuation from 55 to 58 years, there was later a change of policy and the age of superannuation was once again reduced to 55 years. But this is the first occasion—neither our researches nor those of the learned counsel have been able to trace another case of this kind—where the age of superannuation was first raised from 55 to 58 years, there was then a change of policy a few years later reducing the age of superannuation from 58 to 55 years and finally there was again, within a few months, a reversion to the higher age of superannuation of 58 years. The cases of Bishnu Narain Mishra v. State of Uttar pradesh, (1965) 1 SCR 693 : (AIR 1965 SC 1567) and K. Nag-

araj v. State of Andhra Pradesh, AIR 1985 SC 551 belong to the second category of cases. In Bishnu Narain Mishra's case, by a notification dated November 27, 1957 the Government of Uttar Pradesh raised the age of superannuation from 55 to 58 years. On May 25, 1961 the Government reduced the age once again the 55 years, and further laid down that those who had continued beyond the age of 55 years owing to the earlier notification would be deemed to have been retained in service beyond the age of superannuation and would be compulsorily retired on December 31 1961. The appellant who attained the age of 55 years on December 11, 1960 and was continued in service was one of those who was retired on December 31, 1961. He questioned the change in the rule of retirement on the ground that it was hit by Art. 14 in as much as it resulted in inequality between public servants in the matter of retirement. The argument was that when all those who had passed 55 years were asked to retire on December 31, 1960 some had just completed 55, some were 56, some were 57 and so on and, therefore, there was discrimination. Dealing with this question, Wanchoo, J. speaking for the court observed :

"The last argument that has been urged is that the new rule is discriminatory as different public servants have in effect been retired at different ages. We see no force in this contention either. So far as the rule is concerned it applies equally to all public servants and fixes the age of retirement at 55 years. There is no discrimination in the rule itself. It is however urged that the second notification by which all public servants above the age of 55 years were required to retire on December 31, 1961 except those few who completed the age of 58 years between May 25, 1961 and December 31, 1961 shows that various public servants were retired at various ages ranging from 55 years and one day up to 58 years. That certainly is the effect of the second order. But it is remarkable that the order also fixed the same date of retirement namely December 31, 1961 in the case of all public servants who had completed the age of 55 years but not the age of 58 years before December 31, 1961. In this respect also, therefore, there was no discrimination and all public servants who had completed the age of 55 years was being introduced as the age of superannuation by the new rule by way of reduction were ordered to retire on the same date, namely Dec- 31, 1961. The result of this seems to be that the affected public servants retired at different ages. But this was not because they retired at different ages- but because their services were retained for different periods after fifty-five. Now it cannot be urged that if Government decides to retain the services of some public servants after the age of retirement it must retain every public servant for the same length of time. The retention of public servants after the period of retirement depends upon their efficiency and the exigencies of public service, and in the present case the difference in the period of retention has arisen on account of exigencies of public service. We are, therefore, of opinion that the second notification of May 25, 1961 on which reliance is placed to prove discrimination is really not discriminatory' for it has treated all public servants alike and fixed December 31, 1961 as the date of tetirement for those who had completed 55 years but not 58 years up to December 31, 1961. The challenge therefore, to the two notifications on the basis of Art. 14 must fail."

17. The situation which was considered in Bishnu Narain's case (AIR SC 1567) was exactly the idential situation which obtained on February 28, 1983 in the present case and precisely the situation which was considered by the judgment pronounced on January 18, 1985 and which is reported in AIR 1985 SC 551 as K. Nagaraj V. State of Andhra Pradesh, the very judgment the delay in pronouncing which is said to have led to this confusion. Neither in Bishnu Narain Mishra's case nor in Nagaraja's case had the court occasion to consider the further step that had been taken in the present case, namely, once again raising the age of superannuation to 58 years and the exclusion of a class of persons from its benefit. Both the cases are therefore plainly distinguishable and are of no assistance to us in solving the problem before us.

18. Another case on which reliance was placed by the learned counsel appearing for the respondents in Writ Petitions Nos. 3203, 3413, 3419, 3420-3426 etc. etc. of 1985 was State of Assam v. Padma Ram Borah, AIR 196 SC 473. In that case a Government servant who was due to retire from servic on and from January 1, 1961, was suspended from service on December 22 1960, pending a departmental inquiry His services were extended till March 31, 1961. The departmental inquiry was however, not concluded even by then So on May 9, 1961, the Governmen passed an order extending his service for a period of 3 months with effec from April 1, 1961. This court held that the Government had no jurisdiction to extend the services of a Government servant, after he had retired from service, merely for the purpose of continuing the departmental inquiry. Rule 56 of the Departmental Rules did not authorise such a course. It is difficult to see how this case can possibly assist the respondents in Writ Petitions Nos. 3203, 3413-3419, 3420-3426 etc. etc of 1985 It is one thing to say that the Executive Government has no power to pass an order extending the service of a Government servant after he has retired from service; it is altogether a different thing to say that the state while making a law raising the age of superannuation cannot make an unreasonable classification to exclude some Government servants from the benefit of the increased age of superannuation. The classification must pass the dual test of being reasonable and related to the object of the legislation besides not being arbitrary. It is not open to the State to make an arbitrary classification first by making the date

dependent on an uncertain event namely, the date of pronouncement of judgment by the Supreme Court and next by making a legislation excluding persons who had attained the age of 55 years before the legislation took effect though the legislation itself was designed to undo the wrong already done to the very Government employees. Some other cases were also cited before us to illustrate the point that it is open to the Legislature and the Executive to choose a cut-off' date for bringing into force laws such as Land Reform Laws etc. It is true that whenever a law is made or whenever an action is taken, it has to be with effect from a certain date but it does not necessarily follow that the choice of the date is not open to scrutiny at all. If the choice of the date is made burdensome to some of those, the wrong done to whom is sought to be rectified by the law, it would certainly be open to the court to examine the choice of the date to find out whether it has resulted in any discrimination.

19. We think that the one case which is really of assistance to us in this matter is the recent decision of the Constitution Bench in D.S. Nakara v. Union of India, (1983) 2 SCR 165 : (AIR 1983 SC 130). We propose not merely to quote extensively from Nakara's case, not merely to adopt the principles therein laid down but also to employ the very techniques applied there to solve the problem. The question arose there whether, for the purpose of application of the liberalised pension rules, the Government of India could stipulate March 31, 1979 as the date for dividing Government employees into two classes : one class who had retired before March 31, 1979 who would not be entitled to the benefits of the liberalised pension rules and the other class who retired after March 31, 1979 who would be entitled to such benefits. The submission was that the differential treatment accorded to those who had retired prior to the specified date was violative of Art. 14 as the choice of the date was arbitrary and the classification based on the fortuitous circumstances of retirement before or subsequent to the specified date was invalid. This submission was accepted by the Constitution Bench. Justice D.A. Desai speaking for a unanimous court considered the question at great length in all the implications. First, considering the scope of Art. 14, it was observed :

"The decisions clearly lay down that though Art. 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In other, however, to pass the test of permissible classification, two conditions must be fulfilled, viz. (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and (ii) that differentia must have a rational relation to the objects sought to be achieved by the statute in question.....

The other fact of Art. 14 which must be remembered is that it eschews arbitrariness in any form Article 14 has, therefore not to be held identical with the doctrine of classification." Thereafter the court posed the question :

> "As a corollary to this well established proposition, the next question is, on whom the burden lies to affirmatively establish the rational principle on which the classification is founded correlated to the object sought to be achieved?"

The question was answered and it was said :

> "The State, therefore, would have to affirmatively satisfy the Court that the twin tests have been satisfied. It can only be satisfied if the State establishes not only the rational principle on which classification is founded but correlates it to the objects sought to be achieved."

The submission made by the learned Attorney General on behalf of the Union of India was summarised ;

> "Thus according to the respondents. pensioners who retire from Central Government service and are governed by the relevant pension rules all do not form a class but pensioners who retire prior to a certain date and those who retire subsequent to as certain date form distinct and separate casses. It may be made clear that the date of retirement of each individual pensioner is not suggested as a criterion for classification as that would lead to an absurd result, because in that event every pensioner relevant to his date of retirement will form a class unto himself. What is suggested is that when a pension scheme undergoes a revision and is enforced effective from a certain date, the date so specified becomes a sort of a rubicon and those who retire prior to that date form one class and those who retire on a subsequent date form a distinct and separate class and no one can cross the rubicon "

The Court then proceeded to consider the question : what is a pension? and why a liberalised pension schemes? After answering these questions, the court referred to Some of the very argument now advanced before us that the date is an integral part of the scheme and so not serverable from the scheme at all and that the Court should not usurp legislative functions. The learned Attorney General's argument on these question was :

> "The learned Attorney General contended that the scheme is one whole and that the date is an integral part of the scheme and the Government would have never enforced the scheme devoid of the date and the date is not severable from the scheme as a whole Contended the learned Attorney General that the court does not take upon itself the function of legislation for persons, things or situations omitted by the legislature It was said that when the legislature has expressly defined the class with clarity and precision to which the legislation applies, it would be outside the judicial function to enlarge the class and to do so is not to interpret but to

legislate which is the forbidden field. Alternatively it was also contended that where a larger class comparising two smaller classes is covered by a legislation of which one pait is constitutional, the Court examines whether the legislation must be invalidated as a whole or only in respect of the unconstitutional part. It was also said that severance always cuts down the scope of legislation but can never enlarge it and in the present case the scheme as it stands petitioner and if by severance an attempt is made to include them in the scheme it is not cuting down the class or the scope but enlarge the ambit of the scheme which is impermissible even under the doctrine of severability. In this context it was lastly submitted that there is not a single case in India or elsewhere where the Court has included some category within the scope of provision of a law to maintain its constitutionality."

Proceeding then to meet the submission of the learned Attorney General, Desai, J. said,

"If it appears to be indisputable, as it does to us that the Pensioners for the purpose of pension benefits form a class, would its upward revision permit a homogeneous class to be divided by arbitrarily fixing an eligibility criterion unrelated to purpose of revision, and would such classification be founded on some rational principle ? The classification has to be based, as it is well settled, in some rational principle must have nexus to be the objects sought to achieved. We have set out the objects underlying the payment of pension. If the State considered it necessary to liberalise the pension scheme, we find no rational principle behind it for granting these benefits only to those who retired subsequent to that date simultaneously denying the same to those who retired prior to that date. If the liberalisation was considered necessary for augmenting social security in old age to government servants then those who retired earlier cannot be worse off than those who retire later. Therefore, this division which classified pensioners into two classes is not based on any rational principle and if the rational principle is the one of dividing pensioners with a view to giving something more to persons otherwise equally placed, it would be discriminatory. To illustrate, take two persons, one retired just a day prior and another a day just succeeding the specified date. Both were in the same pay bracket the average emolument was the same and both had put in equal number of years of service. How does a fortuitous circumstance of retiring a day earlier or a day later will permit totally unequal treatment in the matter of pension? One retiring a day earlier will have to be subject to ceiling of Rs. 8,100 p.a. and average emolument to be worked out on 36 months' salary while the other will have a ceiling af Rs. 12,000 p. a. and average emolument will be computed on the basis of last ten months, average. The artficial divison stares into face and is unrelated to any principle and whatever principle, if there be any has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not ony no nexus to the liberalised pension scheme but it is counter productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Art. 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified date, the rules accord differential and discriminatory treatment to equals in the matter of commutaion of pensions. A 48 hours difference in matter of retirement would have a traumatic effect. Division is thus both arbitrary and unprincipled. Therefore the classification does not stand the test of Art. 14"

The Court then asked itselt the question : "By our approach, we are making the scheme retrospactive?" The answer was an emphatic 'No'. They said,

"In other words, benefit of revised scale is not limited to those who enter service snbsequent to the date fixed for introducing revised scales but the benefit is extended to all those in sesvice prior to that date. This is just and fair. Now if pension as we view it, is some kind of retirement wages for past service, can it be denied to those who retired earlier, revised retirement benefits being available to future retiress only?,' Therfore, there is no substance in the contention that the court by its approach would be making the scheme retrospective, because it is implicit in theory of wages."

The Court finally considered the favourite argument advanced against what some of the counsel who appeared before us described as judicial 'tinkering' with legislative policy. The Court took the view that the State cannot say 'Take it or leave it.' If there are words in a statute which bring about discrimination, those words can be served. They said, "There is nothing immutable about the choosing of an event as an eligibility criterion subsequent to a specified date. If the event is certain but its occurrence at a point of time is considered wholly irrelevant and arbitrarily selected having no rationale for selecting it and having an undesirable effect of dividing homogeneos class and of introducing the discrimination, the same can be easily severed and set aside. While examining the cases under Art. 14, the approach is not 'either take it or leave it', the approach is removal of arbitrariness and if that can be brought about by severing the mischievous portion the court ought to remove the discriminatory part retaining the beneficial portion. The pensioners do not challenge the liberalised pension scheme. They seek the benefit of it. Their grievance is of the denial to them of the same by arbitrary introduction of words of limitation and we find no difficulty in severing and quashing the same. This approach can be legitimised on the ground that every Government Servant retires State grants

Report No 09 p. 23

O. Chinnappa Reddy
Judge
Supreme Court of India

pward revision of pension undoubtedly from a date. Event has occurred evision has been earned. Date is nerely to avoid payment of arrears vhich impose a heavy burden. If the late wholly removed, revised pensions vill have to be paid from the actual late of retirement of each pensioner. That is impermissible. The State cannot e burdened with arrears commencing rom the date of retirement of each ensioner. But effective from the speciied date future pension of earlier reired Government servants can be computed and paid on the analogy of fitmnts in revised pay-scales becoming propectively operative. That removes the efarious unconstitutional part and reains the beneficial portion. It does not dversely affect future pensioners and heir presence in the petitions becomes rrelevant. But before we do so, we ust look into the reasons assigned for ligibility criteria, namely in service on he specified date and retiring after that ate;"

The learned Judges then expressed heir disinclination to share the fear expressed by the learned Attorney General hat the Parliament would not have nacted the measure if the unconstitutinal part was struck down and added Our approach may have a parliamentry flavour to sensitive noses". Dealng with the question of frame of reef, the Court struck down as uncontitutional the words, "that in respect f the Government servants who were n service on the 31st March, 1979 and etiring from service on of after that

date" and the words "the new rates of pension are effective from 1st April, must look into the reasons assigned for iligibility criteria, namely, 'in service on the specified date and retiring after that date'."

The learned Judges then expressed their disinclination to share the fear expressed by ths learned Attorney General that the Parliament would not have enacted the measure if the unconstitutional part was struck down and added "Our approach may have a parliamentary flavour to sensitive noses". Dealing with the question of frame of relief, the Court struck down as unconstitutional the words, "that in respect of the Government servants who were in service on the 31st March, 1979 and retiring from service on or after that date" and the words "the new rates of pension are effective from 1st April, 1979 and will be applicable to all service officers who became/become non-effective on or after that date" in the impugned memoranda; but specified that "the date mentioned therein will be relevant as being one from which the liberalised pension schemes becomes operative to all pensioners governed by 1972 Rules irrespective of the date of retirement." It was declared "all pensioners governed by the 1972 Rules and Army Pension Regulations shall be entitled to pension as computed under the liberalised pension scheme from the specified date, irrespective of the date of retirement."

20. In the course of our narration, we have already stated our conclusions

on several of the questions at issue, both factual and legal. The final situation that emerges is that almost immediately after the age of superannuation was reduced from 58 to 55 years, it was realised by the Government of Andhra Pradesh that they had taken a step in the wrong direction and that serious wrong and grave injustice had been done to their employees. A decision was very soon taken to redress the wrong by reversing the decision but an unfortunate rider was added that they should wait till the pronouncement of the judgment of the Supreme Court, which was perhaps expected to be pronounced shortly. As the judgment was not pronounced for long, it became imperative for the Government to implement their decision of their own accord and so they passed Ordinance No. 24 of 1984 and Act No. 3 of 1985, amending Act No. 23 of 1984 by substituting 58 years for 55 years. While doing so, unfortunately again, those that had suffered most by being compelled to retire beween 28-2-83 and 23-8-83 were denied the benefit of the legislation by Cl. 3 (1) of the Ordinance and S. 4 (1) of Act No. 3 of 1985. Now if all affected employees hit by the reduction of the age of superannuation formed a class and no sooner than the age of superannuation was reduced, it was realised that injustice had been done and it was decided that steps should be taken to undo what had been done, there was no reason to pick out a class of persons who deserved the same treatment and exclude from the benefits of the beneficent treatment by classifying them as separate group merely because of th delay in taking the remedial actio already decided upon. We do nc doubt that the Judge's lyfriend and cour nsellor, 'the common man', if asked, wi unhesitatingly respond that it would b plainly unfair to make any such classi ication. The commonsense respons that may be erpected from the commo man, untrammelled by legal lore an learning, should always help the judg in deciding questions of fairness, arbit ariness etc. Viewed from whatever angle to our minds, the action of the Gover nment and the provisions of the legisl ation were plainly arbitrary and discri iminatory. The principle of Nakar clearly applies. The division of Gover nment employees into two classes, thos who had already attained the age of 5 on 28-2-83 and those who attained th age of 55 between 28-2-83 and 23-8-84 o the one hand, and the rest on the othe and denying the benefit of the highe age of superannuation to the forme class is as arbitrary as the division o Government employees entitled to pension in the past and in the future int two classes, that is, those that had retired prior to a specified date and those that retired or would retire after th specified date and confining the benefit of the new pension rules to the latte class only. Legislations to remed wrongs ought not to exclude from thei purview persons, a few of the wronged unless the situation and the circumstances make the redressal of the wrong, i their case, either impossible or so dete rimental to the public interest that the mischief of the remedy outweighs the mischief sought to be remedied. We do not find that there is any such impossibility or detriment to the public interest involved in reinducting into service those who had retired as consequence of the legislation which was since thought to be inequitable and sought to be remedied. As observed in Nakara (AIR 1983 SC 130), the burden of establishing the reasonableness of a classification and its nexus with the object of the legislation is on the State. Though no calamitous consequences were mentioned in any of the counter-affidavits, one of the submissions strenously urged before us by the learned Advocate General of Andhra Pradesh and the several other counsel who followed him was the oft-repeated and now familiar argument of 'administrative chaos'. It was said that there would be considerable chaos in the administration if those who had already retired are now directed to be reinducted into service.

21. We are afraid we are unable to agree with this submission. Those that have stirred up a hornet's nest cannot complain of being stung. The argument about administrative chaos has been well met by Lord Denning M. R. in Brabdury v. London Borough of Enfield, (1967) 3 All ER 434, where the Master of Rolls in his characteristic and forceful way observed :

"It has been suggested by the Chief Education Officer that, if an injunction is granted, chaos will supervene. All the arrangements have been made for the next term, the teachers appointed to the new comperehensive schools, the pupils allotted their places, and so forth. It would be next to impossible, he says to reverse all these arrangements without complete chaos and damage to teachers, pupils and public. I must say this : if a local authority does not fulfil the requirements of the law, this court will set that it does fulfil them. It will not listen readily to suggestions of "chaos". The department of education and the council are subject to the rule of law and must comply with it, just like everyone else. Even if chaos should result, still the law must be obeyed but I do not think that chaos will result. The evidence convinces me that the 'chaos" is much over stated.........I see no reason why the position should not be restored. so that the eight schools retain their previous character until the statutory requirements are fulfilled I can well see that there may be considerable upset for a number of people, but I think it far more important to uphold the rule of law. Parliament has laid down these requirements so as to ensure that the electors can make their objections and have them properly considered. We must see that their rights are upheld."

In the present case too we think that the case of chaos is much overstated. The affidavits do not disclose what disastrous consequences, insoluble problems and unsurmountable difficulties will follow and how chaos will in evitably result. True quite a large number of employees who have been promoted will have been promoted will have to be reverted, but their promotions and promotional-appointments are all temporay (and we take care to add here it would make no difference even if a few were regularly promoted) and it is not as if they lose for ever their promotional opportunities. The promotional opportunities are merely postponed to the dates on which they would be entitled to be promoted had not the fundamental rules and the Hyderabad Civil Services Rules been amended and Act No. 23 of 1984 passed. What has now happened is that these persons have secured a double advantage. First, by the initial reduction of the age of superannuation, they obtained early and unanticipated promotion, that is to say promotion ahead of the normal date on which they would have otherwise been promoted; and second, their tenure in the promoted post was increased by a further three years as a result of the subsequent increase of the age of superannuation. Having secured this double advantage they naturally desire to stick to them and talk glibly of hardship and inconvenience On the other hand, it would be a great injustice to deny justice to those who have suffered injustice most merely because it may cause inconvenience to the administration. We are governed by the Constitution and constitutional rights have to be upheld. Surely the Constitution must take predence over convenience and a judge may not turn a bureaucrat. We de not mean to suggest that creation of a chaotic state of administration is not a circumstance to be taken into account. It may be possible that in a given set of circumstances, portentous administsative complexity may itself lustify a classification. But, there must be sufficient evidence of that—how the circumstances will lead to chaos. Ups and downs of career bureaucrats do not by themselves justify such a classification. It may, however, be of some consequence in the matter of granting relief. For instance, there would be readyly no point in reinducting an employee if he has but a month or two to go to attain the age of 58 years and to retire. Reinduction of such a person is not likely to be of any use to the administration and may indeed be detrimentnl to the public interst. It is bound to be wasteful. In such cases as well as in cases where they cannot be reinducted because they have already completed 58 years by now, they cannot obviously be reinducted. So other ways of compensating them must be found. The obvious course is to compensate them monetarily. In Industrial Law we do award back and future wages on quite a large scale and there is no reason why we cannot adopt the same principle here. If as a rule private employers in such situations are asked to pay back wages, we see no impediment in doing so in the case of those that are expected to be model employers i. e. the Government, public corporations and local authorities.

22. An argument which requires to be dealt with is that it is open to the

Court to give retrospectivity to a legislation to which the legislature plainly nd expressly refused to give retrospectvity. As pointed out in Nakara's case AIR 1983 SC 130), the question is not ne of retrospectivity at all. The circunstance that the relief given by Ordiance No. 24 of 84 and Act No. 3 of 985 is not intended to those who had ttained the age of 55 years by Februry 28, 1983 or between 28-2-83 and 3-8-84, has the effect of limiting the eld of operation of the Ordinance and he Act and the Act and introducing a lassification which in order to be sustaied must be shown to be reasonable nd to have a nexus to the object to be chieved besides not being arbitrary. Vhile it is a general rule of law that tatutes are not to operate retrospectvely, they may so operate by express nactment, by necessary implication rom the language implied or where he statute is explanatory or declaratory r where the statute is passed for the urpose of protecting the public agaist some evil or abuse or where the tatute engrafts itself upon existing ituations etc. etc. But it would be inorrect to call a statute retrospective', 'because a part of the requisites for ts action is drawn from a time antecednt to its passing". (Vide R v. St. Mary Whitechapel (Inhabitants) (1848) 2 QB 120). We must further rememer, quite apart from any question of etrospectivity, that, unlike in the Jnited Kingdom here in India we have written Constitution which confers usticiable fundamental rights and so he very refusal to make an Act retrospective or the non-application of the Act with reference to a date or to an event that took place before the enactment may, by itself, create an impermissible classification justifying the striking down of the non-retroactivity or non-application clause, as offending the fundamental right to equality before the law and the equal protection of the laws. That is the situation that we have here.

23 We may now refer to two arguments which were mentioned in passing but were not pursued. The first was that a writ petition similar to Writ Petitions Nos. 3420-3426/83 etc. had been filed earlier and had been dismissed in limine by a Bench of this Court. We do not see how the dismissal in limine of such a writ petition can possibly bar the present Writ Petitions. Such a dismissal in limine may inhibit our discretion but not our jurisdiction. So the objection such as it was, not pursued further. So also the second objection which related to the non-joinder of all affected parties to the litigation. We are quite satisfied that even if some individual affected parties have not been impleaded before us their interests are identical with those and have been sufficiently and well represented. Further, the relief claimed in Writ Petitions Nos. 3420-3426 of 1983 etc. is of a general nature and claimed against the State and no particular relief is claimed against any individual party. We do not think that

the mere failure to implead all affected parties is a bar to the maintainability of the present petitions in the special circumstances of these cases where the actions are really between two ‘‘warring groups’.

24. Finally we come to the question of the relief to be granted. We find that Cl. 3 (1) of Ordinance No. 24 of 84 and S. 4 (1) of Act No of 1985 may easily be brought to conform to the requirements of Art. 14 of the Constitution by striking down or omitting the naughty word ‘not’ from those provisions. We may possibly achieve the same object by striking down the whole of Cl. 3 (1) of the Ordinance and S. 4 (1) of the Act but then the question may arise whether the rest of the Act would be sufficient to bring in those who have been excluded. We think that the safer course would be to strike down the offending word ‘not’ from these provisions. That we have such power is clearly laid down in Nakara’s case where the court directed the deletion of some words from the offending clause and directed it to be read without those words To make matters clear and to put them beyond dispute, we give the followtng directions in exercise of our powers under Act 32 and 142 of the Constitution :

‘‘1. All employees of the Government, public corporations and local authorities, who were retired from service on the ground that they had attained the age of 55 years by 28-2-83 or between 28-2-85 and 23-8-84, shall be reinstate in service provided they would not b completing the age of 58 years on or before 31-10-1985.

2. All employees who were compelled to retire on February 28, 1983 an between February 28, 1983 and Augus 23, 1984 and who are not eligible fo reinstatement under the first clause shall be entitled to be paid compensation equal to the total emoluments whic they would have received, had they bee in service, until they attained the age c 58 years, less and amount they migh have received ex gratia or by way c pension etc. Or under the interim order of this Court. They will be entitled t consequential retiral benefits.

3. Such of the employees as hav not been compelled to retire by virtue c orders of stay obtained from the Hig Court or the Administrative Tribuna or who have actually been reinstated i service pursuant to interim orders c this Court, shall be allowed to cntinu in service until they attain the highe age of superannuation.

4. The reinduction of those employees that have been compelled to retir previously will put them back as regard their seniority in precisely the sam position which they occupied before the were retired from service before. They will be entitled to all further conseqential benefits.

5. The employees who were retire and who are reinducted will be entitle to be compensated for the period durin

which they were out of service in the same manner as mentioned in clause (2).

6. In the matter of reinduction of employees who bo not allain the age of 58 years on or defore 31st October, 1985, the Government may exercise an option not to reinduct them in the case of all or some or any hf the employees, as the case may be, provided the employees are paid the compensation as in the case of those covered by (2) and (5)

7. All interim orders are vacated and subject to these directions, the Government is free to revert persons promoted or appointed to the posts held by persons who were retired on having attained the age of 55 years by 28-2-1983 or betwcen 28-2-83 and 23-8-84 to the posts which they held on February 28, 1983 or on the dates previous to their promotion or appointment provided that they need not be so reverted, if they would otherwise be entitled to be promoted or appointed even if the other employees had not been retired consequent on the lowering of the age of superannuation

8. The Government shall be free to create supernumerary posts wherever they consider it necessary so to do.

9. All payment of compensation to be made and completed before December 31, 1985. If for any reason the Government finds itself unable to pay the entire amount at one time within the time fixed by us, the Government will be at liberty to pay the amount in not more than four instalments within the time stipulated by us. The Government will also have the liberty to apply to us for extension of time, if so advised. Wherer the employees are awarded compensation by the Government, such employees may apply to the concerned Inconcome-tax Officer for relief under Sec. 89 of the Income-tax Act read with R. 21A of the Income-tax Rules and the Income-tax officer concerned will grant the appropriate relief."

25. With these directions, Writ Petitions Nos. 3420-26 of 1985 etc. are allowed with costs and Writ Petitions Nos. 5447-5546 of 1985 etc. are dismissed but in the special circumstances without any order as to costs.

KHALID, J. :—26. After considering the rival contentions put forward by the learned counsel on both sides, the factual matrix and law involved, the following points gave me some difficulty in accepting the petitioners' case. I felt that these points posed hurdles in the way of the petitiones succeeding in their attempt to secure the relief sought. I am formulating the points as I understood them.

(1) This Court in K. Nagaraja v. State of A. P., AIR 1985 SC 551 upheld the action of the Government in reducing the age of retirement from 58 to 55. The contention that such reduction was arbitrary and irrational was not accepted. Further, the contention that the age of superannuation was incresed from 55 to 58 years with effect from October 29, 1979, after an elaborate and scientific

enpuiry by a one-man pay commission did not find favour with this Court because it felt that the question of the age of retirement was not referred to the Commission. Accordingly the Court held that the decision regarding the age of retirement was a matter of policy in the formulation of which the Government must be allowed a free and fair role to play. It is not always necessary that such a decision is taken on the basis of empirical data collected on scientific investigation. The further submission that the decision to reduce the age of retirement from 58 to 55 years was arbitrary in view of the fact that it was taken by the State Govrnment within one month of the assumption of office by it also did not find favour with, this Court. This Court observed that the reasonableness of a decision in any jurisdiction, did not depend upon the time whicd it took. This decision has become final and the petitioners before us cannot in any manner an authority for the proposition that the charge of arbitrariness cannot be laid at the doors of the Government in matters relating to policy decisions and that the Government have full powers to decide about the age retirement considering the various data available before it.

(2) Bishun Narain Mishra v. State of U. P. (1965) 1 SCR 693: (AIR 1965 SC 1567) is a decision rendered by a Constitution Bench of this Court. In that case, a notification on November 27, 1957, raised the age of superannuation from 55 to 58 years. On May 25, 1961, the age of retiremnt was reduced once again to 55 years. It was provided in the second notification that those who were retained in service beyond the age of superannuation on the basis of the earlier notification would be compulsorily retired on December 31, 1961. The second notification was questioned as being arbitrary and hit by Art. 14 since it resulted in inequality between the public servants in the matter of retirement. In this Judgment the classification of Governmet employees who were in service into two groups based on their age was upheld by the Constitution Bench as a reasonable cassification. I felt that this case had a great bearing on the petitions before us and the principle laid down there could be extended to the cases before us. It was strongly contended that if classification of two groups of in-service employees on the basis of age and a cut off date could be justified as reasonable classification, it can be more so in cases like the one before us where the elassification is between the retired employees and those in service.

(3) By the operation of a valid law, some employees have retired by superannuation and have thus ceased to be members of their respective service. What is now attempted is to retropectively re-induct them iato service, a procedure that Courts should frown upon and not encourage.

(4) For the purpose of the cases before us, Bishun Narain Mishra's case is more appropriate and useful than that of D. S. Nakar

v. Union of India (1983) 2 SCR 165 : (AIR 1983 SC 130) which dealt with two classes of retired employees and a cut off date. The attempt to distinguish Bishun Narain's case on the factual difference available in these case is a matter for further probe, in order to see how far the distinction in destructive of the principle laid down there in its application to these cases.

(5) The original attempt by the petitioners was to get Section 3 of the amending Act struck down in its entirety. Now they realise that such a relief would not serve their purpose. What they now want is that this Court should remove the word 'not' from the Section, so that the petitioners will be rescued from the mishief of that word. Removing a word or adding words to a legislative enactment is an exercise, Courts have been repeatedly warned against from embanking upon. I personally feel that this guideline is one that has to be (illegible) (sic).

(6) A petition, similar to the one before us, wae filed in this Court as W. P. No. 16010/1984 raising identical points. This writ petition came up for hearing on 12-2-1985 before a Bench consisting of the Chief Justice, Justice D.A. Desai and Justice A. N. Sen. After hearing the counsel for the petitioner as well as the State of Andhra Pradesh, the Bench suggested that the counsel, for the State should take instructions from the State of Andhra Pradesh about reinstating in service of those persons who had not attained 58 years of age, but without back wages. The case was adjourned to 19-2-1985 for that purpose. I understand that counter affidavits were also filed in that case The case appeared before a Bench consisting of Justice R. S. Pathak and Justice A Varadarajan on the next occasion. On that occasion, the petition was dismissed, after hearing Normally this Court will be disinclined to entertain or to hear petitions raising identical points again where on an earlier occasion, the matter was heard and dismissed. Not that this Court has no jurisdiction to entertain such matters, but would normally exercise its discretion against it. One of the counsel appearing for the respondents strongly pleaded the bar of res judicata against these petitions on the basis of the earlier decision.

(7) The learned Advocate General of the Andhra Pradesh with great concern and justifiably appealed to us that if the petitions were allowed, it would cause serious dislocation in the administration. He strongly pleaded that the action taken did not have any tinge of mala fides that there was no attempt at picking and choosing of any Government servant and that therefore the Court should not exercise its jurisdiction to annul a policy decision.

27. I have given my anxious considerations to the above question and the rival submissions in reply. I find that the case is more or less evenly balanced between the parties. Two important factors have, however, per-

suaded me, to agree with the main Judgment and to err on the side of Justice more than that of law, invoking the benevolent jurisdiction under Art 142 (1) of the Constitution of India which reads :

> "142 (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be unforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

28. These petitions involve a serious human problem Employees of the State with limited sources, who have been planning their future with a secure feeling that they could work till the age of 58 years, have as though overnight, been robbed of their tenure, their aspirations the helpless victims of certain swift moves on the political chess board. These swift moves, perhaps taken in a hurry, without serious application of mind have resulted in arbitrariness that has been forcefully project by the petitioners. This plea cannot be light heartedly thrown overboard. Justice demands that the petitioners should be saved of their predicament.

29. The second factor that has prevailed upon me to give succour to the petitioners is the blame that this Court has to share for the sorry state that has come to pass in the matter. Without meaning disrespect to anyone, I firmly believe, that prompt action by the Court, would have eased the situation, considerably and relieved the petitioners of thier sad plight and use of this avoidable exercise. It is not as the subsequent developments were not brought to the notice of this Court in Nagaraja's case, (AIR 1985 SC 551) (supra). We were told that the Bench was alerted in time about the developments that had taken place but unfortunately they were not taken this account. When the judgment ultimately came on 18-1-1985 as many as 6000 employees had lost their service, a tragic result not based on any relevant consideration having a nexus to the age of superannuation. The damage had been done and it can be repaired only by extending this Court's powers to a section of employees who deserves sympathy and fair deal.

30. This short judgment is only to vindicate my stand. I respectfully agree with the judgment prepared by my learned brother Reddy, J. I am also in entire agreement with my learned brother Eradi, J about the limited scope of the principles laid down in these cases on their peculiar facts.

BALAKRISHNA ERADI, J. :—31. While respectfully agreeing with the judgment prepared by my learned Brother Reddy, J. I have thought it fit to add ew words of my own since I consider iecessary to make it absolutely clear it the conclusion reached by us in ese cases are based entirely on the ecial facts and circumstances constitu- g the legislative history of the impug- d Andhra Pradesh Ordinance No. 24 1984 and Act 3 of 1985 which have en set out in extenso in the judgment Reddy, J.

32. We are not to be understood laying down that whenever the age of perannuation or Government employ- s or of employees of local authorities :. is enhanced the benefit of such enh- cement should be extended not merely persons in service on the date on iich the change is effected but also to rsons who have already retired from rvice prior to that date. It is now ell established by decisions of this ourt that the Government has full ower to effect a change in the age of perannuation of its employees on levant consideration . If in the exercise such power the age of superannuation enhanced purely by way of implement- ion of a policy decision taken by the overnment, such alteration can legally brought about with prospective effect om the date of the commencement of the peration of the Ordinance, Act or Rule id no question of violation of Art. 4 or 16 of the Constitution will arise erely because the benefit of the change is not extended to employees who have already retired from service. In these cases now before us our conclusion is rested entirely on the finding arrived at by us after a consideration of the factual background and legislative history of the impugned Ordinance and Act that the underlying purpose and object behind the relevant provisions of the Ordinance and the Act was to set right and nullify a wrong or injustice that had been done to the employees by the abrupt reduction of the age of superannuation from 58 years to 55 years by Ordinance No. 8 of 1983 and the Government's Notification issued as per G. O. Ms. No. 36, dated 8th February, 1983 which preceded it. All that we are holding is that in the concext of these telling facts and circumstances which conclusively show that the object and purpose of the Legislation been done, there is no rational or reasonable nexus or basis for seperately classifying the employees who had retired from service prior to the date of commencement of Ordinance No. 23 of 1984, who are the persons most affected by the wrong———by denying to them the benefit of the rectification of the injustice. It is solely on this ground that we are allowing these writ petitions and granting the reliefs pecified in the judgment of Reddy, J.

Order accordingly.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

Report No 10 p 01

Prem Chand Jain
Judge
Punjab & Harayana High Court

OBSERVATION

(A) Selection – Competitive examination—Written test and viva-voce—28 per cent marks prescribed for viva-voce – Weight to be given to the viva.voce test as against the written examination, must vary from service to service according to the requirement of the service – Prescribing of 28 per cent of marks for viva-voce not arbitrary on ground that same exceeded 12 per cent of total marks taken into account for selection—Constitution of India, Arts. 14, 16 and 309—Haryana Excise and Taxation Inspectorate (State Service, Class III) Rules (1969), Appendix D.

(B) Selection–Competitive examination–Large number of candidates were called for interviews by itself does not vitiate the selection—Constitution of India, Arts, 14 and 19.

OBSERVED BY

Prem Chand Jain,C.J., Sukhdev Kang
and I S. Tiwana
Hon'ble Judges, P. &. H. High Court

IN

Civil Writ Petn, No, 833 of 1986, decided on 17-7-1986 between Joginder Singh Petitioner v. State of Haryana and others, Respondents

TEXT

Prem Chand Jain, C.J.:—This judgment of ours would dispose of this and the connected C.P.W No. 554 of 1986 (Virender Singh v. State of Haryana and others) as common questions of law and fact arise in both these petitions.

2. In order to appreciate the controversy, certain salient features may be noticed from this petition.

3 Sometime in July 1982, Subordinate Service Selection Board (hereinafter referred to as 'Board) invited applications for recruitment to 29 posts of Taxation Inspectors. These posts of Taxation Inspectors are governed by the statutory rules called 'The Haryana Excise and Taxation Inspectorate' (State Service, Class III) Rules, 1969 (hereinafter called 'the Rules'), Appendix 'D, to the Rules which makes provision relating to the subjects and standard of the competitive examination of candidates for the post of Inspectors, is in the following terms:—

"1, (1) The examination shall comprise four papers and a viva voce,

(2) The questions papers of English and General knowledge will be answered in English, while those of Hindi in Hindi,

(3) No candidate shall be deemed

to have qualified for the viva voce unless he obtains a minimum of 33 percent marks in each subject and a minimum of 40 per cent in the aggregate. There shall, however, be no minimum for the viva voce. The total marks of the written papers and viva voce will determine the rank of the candidate.

(4) The following will be the subjects of the examination :

(1) English	.....100 marks
(2) Hindicin Devnagri script)	50 marks
(3) General knowledge	...100 marks
(4) Viva Voce	...100 marks

4. The petitioner appeared in the written test and was declared successful and called for interview on 14th December, 1985, at New Delhi. The petitioner appeared before the Board. It is avered in the petition that the petitioner was interviewed for about 1 minutes and only formal questions like name and father's name were asked. No other question of any type was asked. On the conclusion of the interview, in the first week of January 1986 the Board recommended 49 persons for the post of Taxation Inspectors.

5. The petitioner through this petition has called in question the validity and legality of the selection on the allegations that the marks allocated for viva voce are 100 marks which come to 28.5 per cent; that in view of the judgment of the Supreme Court in Ashok Kumar Yadav v. State of Haryana, (195) 4 SCC 417, providing of 28.5 per cent marks for viva voce is on the higher side and the selection of the Taxation Inspectors is bad in law, that in spite of the direction issued by the Supreme Court in Ashok Kumar Yadav's case (supra) that the marks allocated for viva voce test shall not exceed 122 per cent of the total marks taken into account for the purpose of selection, the Board has acted improperly and committed patent illegality in keeping viva voce marks at 28.5 per cent, that the higher percentage of marks has been kept by the Board with a view to absorb the kith and kind of the members, that in Ashok Kumar has held that the number of candidates called shall not be more than thrice the number of vacancies, but in the instant case there were only 29 vacancies and the Board called 494—candidates for interview which was about 16 times of the vacancies, and that candidates were interviewed for only one or two minutes with the result that it was not possible for the Members to judge the suitability of the candidates in such a short time On the basis of the actions, the action of the Board has been challenged being arbitrary and violative of the judgment of the Supreme Court in Ashok Kumar Yaday's case (supra) and of Arts. 14 and 16 of the Constitution.

6. The petition came up for motion hearing on 20th, February, 1986, when the Bench issued notice of motion. In response to the notice, Shri L. M. Mehta, Excise and Taxation Commissioner, respondent No. 2, has filed a det-

ailed written statement in which the material allegations made in the petition have been controverted inter alia on the grounds that respondent No 2 had sent a revised demand to respondent No.3 on 4th July, 1985 for 79 candidates of different categories, which included the earlier demand for 29 candidates, that the Board had recommended 49 candidates in the month of January 1986, that the observations of the Supreme Court in Ashok Kumar Yadav's case (1986) Lab IC 1417) (supra) are relevant for the purpose of competitive examination in the case of selection to the Haryana Civil Service (Executive Bench) and other allied services and the same cannot, ipso facto, be made applicable in the case of selection to the post of Taxation Inspectors, that no exaggerated weight has been given to the viva voce test in the case of selected candidates with proven or obvious obligal motives and, therefore, the selection is not tainted with any illegality whatsoever, that respondent No. 2 had sent a revised requisition for 79 posts and if large number of candidates are called for interview, that fact by itself does not vitiate the selection and that the selection made by the Board is in accordance with the rules and the advertisement made.

7. After the filing of the written statement, the matter finally came up for hearing before the Bench on 12th March, 1986, when the following order was passed:—

"In this petition under Art. 226 of the Constitution, the selection of the Taxation Inspectors by the Subordinate Services selection Board Haryana has been challenged on the ground that out of the total marks of 350 for written and viva voce test, 100 marks were allotted to the latter which clothed the said Board with arbitrary powers. Support for this plea was sought from a rceent decision of the Supreme Court in Ashok Kumar Yadav v State of Haryana (1985) 2 Serv LJ 482

The petition has been opposed by the State as well as by the persons who have been selected Mr. Kuldip Singh, the learned counsel for some of the selected persons has brought to our notice a recent iudgment of the Division Bench of this Court in Civil Writ Petition No. 4777 of 1985 (Sukhdev Singh Nirwan v. The State of Punjab) decided on February. 21, 1986 wherein the attack sought to be made on the ground that 35 per cent marks were allotted for interview, turned down. From the perusal of this judgment we find that the rule laid down by the Supreme Court in Ashok Kumar Yadav's case (supra) was not taken of notice by the Bench. In rhe case of fresh entrants to the service through competition, the Supreme Court had directed that marks for viva voce test shall not exceed more than 12.2 per cent for the general category and 25 per cent in the case of ex service officers. The competitiors in the present case were the first entrants to the service and in our view 28% marks for the interview were highly excessive and clothed the Board with arbitray power. Even if in a given case, the candidate who was ahead by 50 marks than the other candidate, the Board by allotting 80 marks to the latter and 20 marks to the former could select the person who was far below the other person in the written test. It was exactly such like arbitrary power of selection with the Board which was sought to be avoided by the Supreme Court in Ashok Kumar Yadav's case (supra) We are, therefore, of the view that the Division Bench decision in Sukhdev Singh's case (supaa) needs reconsideration by a larger Bench This case may be put up before the learned Chief Justice for referring the matter to a larger Bench"

8. This is how we are seized of the matter.

9 The first contention raised by Mr. Malik, learned counsel for the petitioner, was that in comparison to the marks allocated to the written examination, the proportion of the marks allocated to the viva voce test was quite high and that introduced an irredeemable element of arbitrariness in the selection process so as to offend Arts 14 and 16 of the Constitution. In support of his contention, the learned counsel placed reliance on the judgment of the Supreme Court in Ashok Kumar Yadav's case (supra). In other words, the previse contention of the learned counsel for the petitioners was that in Ashok Kumar Yadav's case (1986 Lab IC 1417) (supra) it has authoritatively been held that where the competitive examination consists of a written examination followed by a viva voce test, the marks allocated for the viva voce test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection and as the viva voce marks in the instant case exceed 12.2 per cent of the total marks, the selection made by the Board being contrary to the decision of the Supreme Court in Ashok Kumar Yadav's case (supra) is illegal, arbitrary and offends Arts. 14 and 16 of the Constitution. On the other hand, the learned Advocate-General. Haryana, and Shri Kuldip Singh, Senior Advocate, submitted that the judgment in Ashok Kumar Yadav's case (supra) is not being properly read by the learned counsel for the petitioners, as no such rule has been laid down by Supreme Court that in the case of each and every selection the marks allocated for the viva voce test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection. According to the learned counsel, it would be in each case that determination shall have to be made by the Court as to what should be the percentage of marks for interview.

10. On the contention of the learned counsel for the parties what has to be first found out is—whether the Supreme Court in Ashok Kumar Yadav's case (supra) has ruled that in every service where examination consists of a written examination followed by a viva voce test, the marks for viva voce shall in no case exceed 12.2 per cent of the total marks taken into account for the purpose of selection. In order to find out

a correct answer, it would be appropriate to make a detailed reference to the judgment in Ashok Kumar Yadav's case (1986 Lab IC 1417) (supra).

11. "The facts of that case were that sometime in October 1980 the Haryana Public Service Commission invited applications for recruitment to 61 posts in Haryana Civil Service (Executive) and other Allied Services The procedure for recruitment was governed by the Punjab Civil Service (Executive Bench) Rules, 1930, as applicable to the State of Haryana. Rule 9 (1) of those provided that a competitive examination shall be held at any place in Haryana in each year in or about the month of January for the purpose of selection by competition of as many candidates for the Haryana Civil Service (Executive) and other Allied Service as the Governor of Haryana may determine and such competitive examination shall be held in accordance with the regulation contained in Appendix-1 to the Rules. 10 laid down the conditions for eligibility to appear at the competive examination Regulation I in Appendix I provided that the competitive examination shall include compulsory and optional subjects and every candidate shall take all the compulsory subjects and not more than three of the optional subjects, provided that ex-servicemen shall not be required to appear in the optional subjects English Essay, Hindi, Hindi, Essay and General knowledge carrying in the aggregate 403 marks and there was also viva voce examination which was compulsory and each carried 100 marks. In response to the advertisement issued by the Haryana Public Service Commission about 6000 candidates applied for recruitment and appeared in the written examination held by the Commission. Out of about 6000 candidates who appeared in the written examination, over 1300 obtained more than 45 per cent marks and thus qualified for being called for interview for the viva voce examination. The Commission invited all the 1300 and more candidates who qualified for the viva voce test, for interview. It seems that though originally applications were invited for recruitment to 61 posts, the number of vacancies rose during the time taken up in the written examination and the viva voce test and ultimately 119 posts became available for being filled and on the basis of the total marks obtained in the written examination as well as viva voce test 119 candidates were selected and recommended by the Commission to the State Government. It seems that there were some candidates who had obtained very high marks at the written examination but owing to rather poor marks obtained by them in the viva voce test, they could not come within the first 119 candidates and they were consequently not selected They were aggrieved by the selection made by the Commission and some out of them challenged the validity of the selection by filing a writ petition in this Court on several, grounds. One of the points raised in that case was that in comparison to the marks allocated to the written examination, the proportion

of the marks allocated to the viva voce test was excessively high and that introduced an irredeemable element of arbitrariness in the selection process so as to offend Art. 14 and 16 of the constitution. While dealing with this question, Bhagwati, J. (as his Lordship then was) now Chief Justice, first made reference to certain observations made in the judgment of the Supreme Court in Lila Dhar v. State of Rajasthan, AIR 1981 SC 1777 thus :

"23. This Court speaking through Chinnappa Reddy, J. pointed out in Lila Dhar v. State of Rajasthan that the object of any process of selection for entry into public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So open competitive examination has come to be accepted almost universally as the gateway to public services. But the question is how should the competitive examination be devised ? The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case. To quote the words of Chinnappa Reddy, J. "In the very nature of things it would not be within the purview or even the competence of the Court and the Court would not venture into such exclusive thickets to discover ways out, when the matters are more appropriately left" to the wisdom of the experts. It is not for the Court to lay down whether interview test should be held at all or how many marks must be minimal so as to avoid charges of arbitrariness, but not necessarily always There may be posts and appointments where the only proper method of selection may be by viva voce test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allow a fairly high percentage of marks for the viva voce test. That is why rigid rules cannot be laid down in these matters by Courts. The expert bodies are generally the best judges The Government aided by experts in the field may appropriately decide to have a written examination followed by a viva voce test."

Thereafter reference has been made to the book Public Personnel Administration by Glenn Stahl and also the judgment of the Supreme Court in Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487 for the purpose of elucidating the advantages and disadvantages of a viva voce test. Thereafter the learned Judge proceeded to consider whether the allocation of as high a percentage of marks as 30.3 per cent in the case of ex-Service officers and 22.2 per cent in the case of other candidates for the viva voce rest renders the selection process arbitrary. Again, while considering this aspect, reference was made to the Kothari Committee Report and also the fact that on the basis of that report the percentage of marks allocated to the viva voce test in the competitive examinatinn for the Indian Administrative Service and other Allied Services was brought down still further to 12.2 per cent. In the light of this discussion, it was ultimately found that the allocation of 22.2 per cent of the total marks for the viva voce test infected the selection process with the vice of arbitrariness.

12. After arriving at the aforesaid finding, the next question that was posted for consideration was-as to what should the proper perceatage of marks to be allocated for the viva voce test in both these case i. e. in case of ex-service officers and in case of other candidates. Taking into consideration the percentage adopted by the Union Public Service Commission in case of selections to the Indian Administrative Service and other Allied Services, a direction was issued that hereafter in case of selections to be made to the Haryana Civil Services (Executive Branch) and other Allied Services, where the competitive examination consists of a written examination followed by a viva voce test, the marks allocated for the viva voce test shall not exceed 12.2 per cent of the total marks taken into account for the purpose of selection. It was further suggested that this percentage should also be adopted by the Public Service Commission in other States because it is desirable that there should be uniformity in the selection process througbout the country and the practice followed by the Union Public Service Commission should be taken as a guide for the State Public Service Commisson to adopt and follow. The percentage of marks allocated for the viva voce test in case of ex-service officers was kept at 25 per cent.

13. Now, as I look at the judgment of the Supreme Court in Ashok Kumar Yadav's case (1986 Lab IC 1417) (supra) I find that the determination of the percentage of marks for a viva voce test at 12.2 per cent relates only to the Haryana Civil Services (Executive Branch) and other Allied Service and that percentage for viva voce test cannot apply to the percentage of the viva voce test in the instant case. Reference to other allied Services' in the judgment means those services for which the examination was held by the Commission on the basis of the Punjab Civil Service (Executive Branch) Rules, 1930. I do not agree with Mr. Malik, learned counsel for the petitioners, that by using the words, other Allied Services" their Lordships of the Supreme Court were intending to lay down the percentage of viva voce test with regard to all Services in the State. In para 25 of Ashok Kumar Yadav's case (supra) Bhagwati, J (now the learned Chief Justice) speaking for th Court, has observed thus:

> There cannot be any hard and fast rule regarding the precise weight be given to viva voce test as against the written examination. It must vary from service to service according to the requirement of the service, the minimum qualification prescribed, the age group from which the selection is to be

made, the body to which the task of holding the viva voce test is proposed to be entrusted and a host of other factors. It is essentially a matter for determination by experts. The Court does not possess the necessary equipment and it would not be right for the Court to pronounce upon it, unless to use the words of Chinnappa Reddy, J. in Lila Dhar's case "exaggerated weight has been given with proven or obvious oblique motives."

From the aforesaid observations our view finds full support that the percentage of marks determined for viva voce test was only for the examination held by the Commission on the basis of the Punjab Civil Service (Executive Branch) Rules, 1930; otherwise the aforesaid observations would become meaningless. To emphasize on the basis of the aforesaid observations, the weight to be given to the viva voce test as against the written examination, must vary from service to service according to the requirement of the service, the minimum qualification prescribed, the age group from which the selection is to be made, the body to which the task of holding the viva voce test is proposed to be entrusted and a host of other factors.

14. Moreover, if the contention of the learned counsel for the petitioners is accepted to be correct, then a fortiori it would have to be held that the view enunciated by the Supreme Court in Lila Dhar's case (AIR 1981 SC 1777) (supra) is not correct. In that case, the service in question was Rajsthan Judicial Service. In pursuant to the Rules of that Service, competitiv examination for recruitment of Munsif was held. The Competitive examinatio consisted of a written examination wit two papers in Law carrying 100 mark each and two papers one in Hindi an the other in English each carrying 5 marks and a viva voce examination carrying 100 marks. After the declaratio of the result of the competitive examination, a writ petition was filed by a unsuccessful candidate who had obtained a total of 189 marks, 159 in the written test and 30 in the viva voce, an one of the points raised in that wri petition was that the entire selectio was vitiated by the allocation of 25 per cent of the total marks for the viva voce examination. The learned Judges dealt with that point in depth on the basis of the judicial decisions, the report of the Kothari committee and the book by Glenn Stahi on Public Personnel Administration' and found that the marks allocated for interview were not excessive Now this decision in Lila Dhar's case (supra) has neither been distinguished nor dissented from. If the percentage for all Services has to be taken at 12 2 per cent, as was sought to be urged in the light of Ashok Kumar Yadav's case (1986 Lab IC 1417) (supra)- then certainly the view enunciated in Lila Dhar's case (supra) had to be overruled, but this was not done; rather quotations from that to be urged in the light of Ashok Kumar Yadav's case (1986 Lab-IC 1417) (supra), then certainly the view enunciated in Lila Dher's case (supra) had to

ver ruled, but this was not done; ather quotation from that judg- ent have approvingly been quoted nd as earlier observed in para 25 of he report it has clearly been held that o hard and fast rule can be laid down nd that the precise weight to be given the viva voce test as against the wri- en examination must vary from service service. At this stage, I may advert the unreported decision of this Court Civil Writ Petition No. 4777 of 1985 Sukhdev Singh Nirman v The State of unjab) decided on February 21, 1986, he correctness of which was doubted y the Bench while making the present eference. It may straightway be obser- ed that an argument about allotting 35 er cent marks for interview was casu- lly raised and the same was disposed f without much discussion. Hence that dgment has to be confined only to the cts of that case and cannot be taken a precedent on the point raised efore us

15. In view of the aforesaid discu- ion, the only conclusion that can be rreved at is that on the basis of the de- ision in Ashok Kumar Yadav's case upra) it cannot be held that with reg- rd to each and every Service including he posts of Taxation Inspectors in the tate of Haryana where both written nd viva voce examination is prescribed nly 12.2 per cent marks had to be assi- ned for the viva voce test.

16. This brings us to the next que- ion whether the marks allocated for iva voce which came to 28.5 per cent re on the higher side ? What had been argued by Mr. Malik, learned connsel for the petitioners, was that in comparison to the marks allocated to the written examination, the proportion of the marks allocated to the viva voce test was excessively high and that introduced an irredeemable element of arbitrarinees in the selection process

17. We have heard the learned counsel for the parties and find that in the intstant case the petitioners have not supplird any material nor have furnished any data in support of this plea. As would be evident from the tenor of the petition, the whole case of the petitioners is based mainly on the plea that in Ashok Kumar Yadav's case (1986 Lab IC 1417) (supra), a direction had been given by the Supreme Court to keep the perecentage of viva voce marks at 12.2; but in spite of that direction a higher percentage at 28.5 has been kept, with a view to accommodate those candidates in whom the Board members were interested. On this aspect, we have already held that Ashok Kumar Yadav's case (1986 Lab 1417) cannot be read to mean that percentage of viva voce marks indicated therein is to apply to all the services in the State of Haryana. That being so, it was incumbent upon the petitioners to independentlly show that for the service in question providing of 285% marks for viva voce test was excessive. Open competitive examination has come to be accepted almost universally as the gateway to public service. As to how should the competitive eaxmination be devised Bhagwati J. (now the learned Chief Justice) in Ashok Kumar Yadav's case

(supra) has analysed the matter thus :—

"The competitive examination may be based exclusively on written examination or it may be based exclusively on oral interview or it may be a mixture of both. It is entirely for the Government to decide what kind of competitive examination would be appropriate in a given case. To quote the words of Chinnappa Reddy, J. "In the very nature of things it would not be within the province or even the competence of the Court and the Court would not venture into such exclusive thickets to discover ways out when the matters are more appropritely left" to the wisdom of the experts. It is not for the Court to lay down whether interview test should be held at all or how many marks should be allowed for the interview test. Of course the marks must be minimal so as to avoid charges of arbitrariness, but not necessarily always. There may be posts and appointments where the only proper method of selection may be by a viva voce test. Even in the case of admission to higher degree courses, it may sometimes be necessary to allow a fairly high percentage of marks for the viva voce test down in these matters by Courts. The expert bodies are generally the best judges The Government aided by experts in the field may appropriately decide to have a written examination followed by a viva voce test."

It has already been noticed earlier that there cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test as against the written examination It must vary from service to service according to the requirements of the service, the minimum qualification prescribed; the age group from which the selection is to be made, the body to which the task of holding the viva voce test is proposed to be entrusted and a host of other factors. As earlier observed, the petitioners have not placed any material on the record to faciltarte the recordaing of a finding in their favour. On the basis of conjectures, it is not only difficult, but would also be improper to strike down the marks allocated for viva voce test by holding that they are excessive. Consequently, the contention of the learned counsel is negatived.

18. It was lastly contented by Mr. Malik that in Ashok Kumar Yadav's case (1989) Lab IC 1417) (supra), it has been ruled that where there is a composite test consisting of a written examination followed by viva voce test, the number of candidates to be called for inter-view in order of the marks obtained in the written examination, should not exceed twice or at the highest thrice the number of vacancies to be filled, that in the instant case there were only 29 vacancies and the Board called for interview 494 candidates, which came to 19 times' of the vacancies to be filled and that the selection being contrary to the direction of the Supreme Court was liable to be quashed.

19. On giving our thoughtful consideration to the entire matter, in

Prem Chand Jain
Judge
Punjad & Haryana' High Caurt

the circumstances of the case, we find no merit in this contention of the learned counsel. In the petition, it is stated that the candidates were called for 29 vacancies. In the written statement, it has been averred that respondent No. 2 had sent a revised demand to respondent No. 3 on 4th July, 1985 for 79 candidates of different categories, that against this demand the Board had ecommended 49 candidates in the month of January, 1986, that a large umber of candidates were called for nterview and that fact by itself does not vitiate the selection. There can be no gainsaying that if the original demand s kept in view then the number of candidates called for interview comes to 16 imes and if the revised demand is kept n view than it comes to 6 times. Be that s it may, the fact remains that the umber of candidates called for interview was much bigher then the standard aid in Ashok kumar Yadav's case (supa) In this view of the matter, the question that arises for determination is vhether this fact alone should invalidate he entire selection made by the Board similar situation had arisen in Ashok Kumar Yadav's case (1986) Lab IC 1417), vhere candidates representing more han 20 times the number of available acancies were called for interuiew. ut after going into the merits of ne case, it was observed that suspicion n one's mind that some element of rbitrariness might have entered the assessment in the viva voce examination cannot take the place of proof and a selection cannot be struck down on the ground that the evaluation of the marks of the candidates in the viva voce examination might be arbitrary. In view of this finding. the selection was not struck down irrespective of the fact that a firm finding was recorded that calling of such a high number was not the right course to follow. Therefore, the petitioner in the instant case had positively to prove that the marking done by the Board was plainly and indubitable arbitary or affected by oblique motives. It is only if the assessment is petently arbitrary or the risk of arbitrarinese is so high that a reasonable person would regard arbitariness as inevitable, that the assessment of marks at the viva voce test may be regarded as suffering from the vice of arbitrarines.s But again the petitioners have miserably failed to supply any material or furnish a convincing date in support of their case. In this view of the matter, the contention of the learned counsel, as earlier observed, merits rejection.

20. No other point arises for consideration.

21. For the reasons recorded above, the writ petitions being without any merit, fail and are dismised. In the circumstances of the case, we make no order as to costs.

petitions dismissed.

Report No, 10 p. 12

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

Report No. 11 p. 01

Ranganath Misra
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art. 32, Sch. 2 Part D, Cl. 9(1) (c)—Mandamus—Sitting Judge of a High Court becoming Chairman of Administrative Tribunal—Retiring as High Court Judge, but continuing as Ch irman—As per terms of service his salary was not to exceed Rs 3500/- including his pension—Deduction of Rs. 170/- from the salary towards recovery of pension equivalent of gratuty—Sch. 2 part D Cl. 9 (1) (c) held, not applicable—Deduction found to be illegal—Mandamus issued to Central Government directing forthwith payment of amount so recovered along with costs of Rs. 3000/- of the writ petition (High Court Judges (Conditions of Service) Act (28 of 1954), S. 17 (A) (3) (1). (Paras 4, 6)

OBSERVED BY

Amarendra Nath Sen and Ranganath Misra
Hon'ble Judges Supreme Court of India

IN

Writ Petn. No. 1015 decided on 16.9.1985 between Shiveshwar Prasad Sinha, Petitioner v. Union of India and others, Respondents.

TEXT

ORDER :—The petitioner was a sitting Judge of the Patna High Court when he became the Chairman of the Andhra Pradesh Administrative Tribunal at Hyderabad. He attained the age to 62 on 1-2-80 and ceased to be a Judge of the High Court but continued to be the Chairman of the said Tribunal until 30-11-81, when on grounds of health, he resigned. Under the High Court Judges (Conditions of Service) Act, 1954 as amended in 1976, in the petitioner was found entitled to gratuity of Rs. 18,-666 67 and after adjusting certain loans to be recovered, he was actually paid a sum of Rs. 7,302 02 as retirement gratuity, calculated on the basis of S. 17A(3) (i) of the said Act On 14-12-78 the Government of India in the Ministry of Home Affairs laid down the terms and conditions of service of the Chairman and the members of the Andhra Pradesh Administrative Tribunal, Annexure B to the counter-affidavit filed in this Court indicates those terms so for as the Chairman is concerned. The prescription therein was to the following effect :

"In partial modifications of the terms and conditions of service of the Chairman and Members of the Andhra Pradesh Administrative Tribunal as contained in para 2 of this Ministry's letter......dated the 6th July, 1976 the Central Government hereby determine under para 3 (6) of the Andhra Pradesh Administrative Tribunal (sic), 1976 the following terms and conditions of service for the Chairman and Members of the Tribunal as from 3rd August 1978 :

Chairman - The same remuneration allowances and conditions of service as admissible to a High Court Judge provided that on retirement as a Judge, the pay plus pension and pension equivalent of other retirement benefits, if any, shall not exceed Rs. 3,500/-"

2. On retirement from the High Court, the petitioner's pension was fixed at Rs. 1067/- per month and he was to be paid, while working as Chairman salary on the basis of the difference between Rs. 3,500/- and the pension. the petitioner was, however, paid monthly salary at the rate of Rs. 2263/- and a sum of Rs. 170/- was withheld from the salary. The petitioner maintained that he was entitled to be paid Rs, 3,500/- and, therefore, the difference between that sum and the amount fixed as pension would be the salary to which he would be entitled When no heed was paid to his demand, he was obliged to approach this Court for a writ of mandamus or appropriate direction.

3. Two counter-effidavits have been filed by the Director of Audits and Accounts to justify the claim for deduction of Rs 170/- per month on the basis of pension equivalent of gratuity.

4. At the hearing Mr. Sen appearing for the respondents has not been able to lay his hands on any statutory provision which would authorise such a deduction as pointed out earlier. The gratuity is payable under S. 17A of the High Court Judges (Conditions of Service) Act, 1954, as amended by Act No. 35 of 1976. It is conceded by Mr. Sen that in case the petitioner was not re-employed after 1-2-80, when he retired as a Judge, no recovery was to be made from his pension. The petitioner continued to be Chairman of the Tribunal till he retired on the basis of re-employment and re-employment was covered by the terms indicated in annexure B which we have extracted above. It is conceded by Mr. Sen that the re-employment was contractual and the terms of the contract indicated that the petitioner was entitled to a salary not exceeding Rs. 3,500/- The petitioner has not claimed anything beyond Rs. 3,500/- including the pension and according to him after deducting the pension of Rs. 1,067/- per month he is entitled to the balance sum of Rs. 2,433/- and out of that the sum of Rs. 170/- as pension equivalent of gratuity is not deductible every month. Mr. Sen drew inspiration for the action taken in recovering Rs 170/- per month by laying his hands on the provisions contained in Clause in 9 (1) (c) of Part D of Schedule 11 of the Constitution. That provision relates to the Judges of the Supreme Court and the particular provision indicate that if a Judge of the Supreme Court has

Ranganath Misra
Judge
Supreme Court of India

been a Judge of the High Court previously and before appointment as a Judge of the Supreme Court if he had received a retirement gratuity in respect of previous service, his salary has to be reduced by the pension equivalent of gratuity. This is absolutely on the basis that the retirement has come to an end when the Judge of the High Court has become a Judge of the Supreme Court. The provisions therein or the principle underlying the provision can have no application to a case of this type where the Judge has retired and he undertakes a different service on contractual basis

5. We are satisfied that there is absolutely no justification for directing recovery of the pension equivalent of gratuity at the rate of Rs. 170/- per month. In fact, this amount appears to have been arbitrarily fixed. If the Judge had to be subjected to such a deduction, the entire gratuity was to be taken into account and it could not be confined to the sum paid to him as gratuity after deduction or adjustment. There could be a case where the entire gratuity had been adjusted against existing dues to be recovered and, therefore, nothing was paid in cash at the time of retirement. In such a case there would be no scope to demand any adjustment by way of pension equivalent of gratuity accepting the manner in which it has been done here. The method adopted will have the effect of serving the Judge if the amount of gratuity to which he is lawfully and legitimately entitled.

6. We are, therefore, satisfied that the action of the respondents was without any foundation in law and the petitioner has been unnecessarily harassed over such a triffling matter. Several representations made by him went unheeded and he was obliged to come before this Court. We direct the respondents to forthwith, and at any rate not beyond 30 days from today, to pay all the dues of the petitioner (which he has calculated at Rs. 3,740/-) without any recovery of pension equivalent of gratuity. The petitioner shall be further entitled to the costs of this petition which we assess at Rs. 3,000/-. This amount shall also be paid along with other dues of the petitioner within the time indicated above.

Petition allowed.

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Report No. 11 P. 04

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

OBSERVATION

(A) Disciplinary Action—Central Industrial Security Force Act (50 of 1968), S.22—Central Industrial Security Force Rules (1969), Rs. 37 (b)—Dispensation of nquiry—Members of unit resorting to large scale abstention from duty and parade—lso, disobeying orders of superiors and abusing them in filthy language—Dispensaion with enquiry--Proper. (Constitution of India, Art. 311 (2))

(B) Disciplinary Action—Central Industrial Security Force Act (50 of 1968), S.22—Central Industrial Security Force Rules (1969), R. 35 (b)—Dispensation of enquiry—Delinquent members of unit holding clandestine meetings in collaboration with ertain dismissed members and deciding that efforts be made to restart agitation on vide scale in all units of Southern Zone for forming Association—Dismissals in quesion made to prevent possible recurrence of near mutiny units posted in Southern Zone—Orders of dismissal expressly stating that witnesses were being threatened and ntimidated from coming forward to give evidence and charge-sheets could not be served in spite of efforts to serve charge-sheets—Dispensation of enquiry was proper. (Constitution of India, Art 311 (21)). (Paras 5,6)

(C) Appointing and dismissal authorities—Appointment by Inspector General of Police—Dismissal by Commandant—It is not dismissal by authority subordinate to ppointing authority—Constitution of India, Art. 311(1)-Central Industrial Security Force Act (1968), S.22-Central Industrial Security Force Rules (1969), R. 3– (Para 8)

OBSERVED BY

A P. Sen and D. P. Madon

Hon'ble Judges Supreme Court of India

IN

Transferred Cases Nos. 2 to 7 of 1983 decided on 31-10-1985 between A. K. Sen, etc. etc Petitioners v. Union of India and another, etc. etc., Respondents.

TEXT

Madon J. :— Six security guards belonging to the Cental Industrial Security Force (hereinafter referred to as "the Force") were dismissed from service by dispensing with the disciplinary inquiry under Clause (b) of Rule 37 of the Central Industrial Security Force Rules, 1969, read with Clause (b) of the second proviso to Article 311 (2) of the Constitution. These provisions authorize a disciplinary authority to dispense with a disciplinary inquiry where it is satisfied, for some reason to be recorded in writing, that it is not reasonably practicable to hold the inquiry. The dismissed security guards filed writ petitions under Art. 226 of the Constitution in the Kerala High Court challenging their dismissal. These petitions were transferred to this Court under Art. 139A (1) of the Constitution as a number of other matters involving the interpretation of the second proviso to Art. 311 (2) were pending in this Court. These other matters were disposed of by a Constitution Bench of this Court by a common judgment, namely, Union of India v. Tulsiram Patel (1985) 3 SCC 398.

2. The question which falls for determination in these Transferred Cases is whether it was not reasonably practicable to hold a disciplinary inquiry against the petitioners. In Tulsiram Patel's Case this Court has in great detail considered the scope and applicability of Clause (b) of the second proviso to Art. 311 (2) and has given illustrative cases where a disciplinary inquiry can be said to be not reasonably practicable. It is in the light of what was held in the majority judgment in that case that the present cases before us fall to be decided.

3. Some of the matters before the Court in Tulsiram Patel case (AIR 1985 SC 1416) related to the Force, and the nature, functions and duties of the members of the Force have been set out and discussed in that judgment and need not be repeated here. Suffice it to say that the Force has been constituted under the Central Industrial Security Force Act, 1968, for the better protection and security of industrial undertakings owned by the Government and of industria undertakings and installations attache thereto or undertakings in the public se tor which may request for such protec tion and security. It is an armed Forc and as shown by the various provision of the said Act, the maintenance of discipline in the Force is of vital importance. In March 1979 the members o the unit of the Force stationed at Bokaro Steel Plant at Bokaro in the State o Bihar formed an All-India Associatio and began to agitate for its recognitio as also for grant of several demands. from May 1979 onwards the agitatio assumed a serious form resulting in the total break-down of discipline, and insubordination ran rampant. There wa large-scale abstention from duty an parade, orders of superior officers were disobeyed and flouted, and superio officer were abused in filthy and obscene language. There were dharnas and gheraos of superior officers. Procession were taken out in which slogans, both defiant and throwing out a challenge to the authorities were shouted. The situation at Bokaro ultimately became so grave that the army had to be called out to disarm the unit posted there and this could only be achieved aft a pitched armed battle which lasted fo three hours between the armed agitator and the army resulting in twenty-tw deaths, among them of an army majo and two other army personnel. Severa members of the Force of the Bokaro Unit were dismissed in the same way as the petitioners before us. Their cases fell to be decided in Tulsiram Patel's Cas and on a consideration of the detailed

materials placed before the Court in those cses, their orders of dismissal were upheld. Apart from calling out the army, similar occurrences took place at Hoshangadad in the State of Madhya Pradesh. The dismissal of a security guard posted at Hoshangabad in similar circumstances was also upheld by the Constitution Bench in Tulsiram patel case. In all those cases the Constitution Bench held that "no person with any reason or sense of responsiblity can say that in such a situation the holding of an inquiry was reasonably practicable".

4. The situation in the southern zone was very similar. Ultimately, four security guards belonging to the Unit of the Force posted at Thumba in the Trivandrum Division who are petitioners in Transferred Cases Nos. 4 to 7 of 1983 and two security guards belonging to the unit posted at Eloor, Alwaye, being the petitioners in Transferred Cases Nos. 2 to 3 of 1283, were dismissed in the manner aforesaid. The materials on the record show that the acts of misconduct charged against the petitioners in Transferred Case Nos. 4 to 7 of 1983 were the same as were before the Court in Tulsiram patel's case (AIR 1985 SC 1416) and the situation which prevailed was very similar.

5. So far as Transferred Cases Nos. 2 and 3 of 1983 are concerned, the materials on the record show that at Eloor also the situation was the same but ultimately returned to normal in June 1980. However, efforts were made in October 1980 to revive the agitation and cladestine meetings were held at village Kulathur, Trivandrum, on October 6 and 7, 1980, in which it was decided that efforts should be made to restart the agitation on a wide scale in all the units of the southern zone. These meetings were held by the petitioners in Transferred Cases Nos. 2 and 3 of 1983 in collaboration with some of the dismissed members of the Force. In order to prevent the possible reoccurrence of a near mutiny by the units posted in the southern zone, swift and deterrent action was necessary and required and these two petitioners were dismissed. The result was that the agitation did not start again in the southern zone.

6. All the impugned orders of dismissal before us expressly state that the witnesses were being threatened and intimidated from coming forward to give evidence and that attempts were made to serve the charge-sheets but that the charge-sheets could not be served. In these circumstances, we can only repeat what was said by the Constitution Bench in Tulsiran Patel's case (AIR 1985 SC 1416) that no person with any reason or sense of responsibility can say that in such a situation the holding of an inquiry was reasonably practicable. Several of the petitioners before us went in departmental appeal and those appeals were also rejected and, in our opinion, rightly rejected.

7. An additional point has been raised in Transferred Cases Nos. 2 and

3 of 1983 that the orders of dismissal were passed by an authority, subordinate to the authority by which the said petitioners were appointed and, there fore, the provisions or Clause (1) of Article 311 of the Constitution were violated. The petitioner in Transferred Case No. 2 of 1983 was appointed on August 8, 1972, and the petitioner in Transferred Case No 3 of 1983 was appointed on December 30, 1974, by the Assistant Inspector-General. In both these cases the orders of dismissal were passed by the Commandant of their unit. It was submitted that the very designation showed that the Commandant was subordinate to the Assistant Inspector-General. The composition of the Force is set out in Rule 3 of the Central Industrial Security Force Rules, 1969, Rule 3 as it stood gave the rankings as (1) Inspector-General, (2) Deputy Inspector-General, (3) Commandant (Chief Security Officer). The Assistant Inspector-General did not feature in the said Rule. This post was obviously created some time before August 30, 1972, on which date the petitioner in Transferred Case No. 2 was appointed. These petitioner have not produced any material to show when and how this post was created or what was the ranking given to the Assistant Inspector-General vis-a-vis the Commandant at that time. However, at the hearing of these Transferred Cases, the respondents produced a letter dated May 29, 1969, from the Deputy Secretary to the Government of India, Ministry of Home Affairs, addressed to the Inspector-General of the Force conveying the sanction of the President of India to the creation of certain post in the Force. Amongst the posts so sanctioned was the post of Assistant Inspector-General who was ranked along with Commandant. Further, Rule 3 was substituted in 1976. The substituted Rule 3 shows that the Assistant Inspector-General/Principal, Training Colleges/Commandant (Fire)/Commandant (Chief Security Officer) all rank equally. This contention must therefore, equally fail.

8. In the result, these Transferred Cases are dismissed.

There will be no order as to the costs of these cases.

9. In conclusion, we may mention that as the petitioners were not represented in this Court, we requested Dr. Y.S. Chitale Senior Advocate, to appear as amicus curiae so that no point which might be in favour of the petitioners may remain to be brought to the notice of the Court and we are much beholden to Dr. Chitale for the assistance which he has rendered to the Court in the course of the hearing of these Cases.

Transferred Cases dismissed.

A. P. Sen
Judge
Supreme Court of India

OBSERVATION

Indian Administrative Service (Regulation of Seniority) Rules (1954, R. 3 (3) (b) —Indian Administrative Service (Cadre) Rules (1954), R. 9—Year of allotment—Promotion of non-cadre officer to cadre post under R. 9 by State Govt. for period exceeding six months—His continuous period of officiation in senior post has to be taken into consideration in reckoning year of allotment. (Constitution of India, Art. 309, 311; Indian Administrative Service (pay) Rules 1954 Sch. II S. III Cl. I, Proviso; Indian Administrative Service (Recruitment) Rules 1954, Rr. 7, 8).

OBSERVED BY

A. P. Sen and
D. P. Madon
Hon'ble Judges, Supreme Court of India.

IN

Civil Appeals Nos 5040-5044 and 5045 of 1985 decided on 19.11.1985, between Union of India, Appellant v. G. N. Tiwari and others, Respondents.

And

Union of India and others, Appellants v. K. L. Jain, Respondent

TEXT

Sen, J, :— After hearing learned counsel for the parties, we had by our order dated October 11, 1985 dismissed these appeals. We now proceed to give the reasons therefor.

2. These appeals by special leave directed against the judgments and orders of the Madhya Pradesh High Court dated September 9, 1983 and December 16, 1983 raise a question as to whether a member of the State Civil Service (Executive) on his temporary appointment by the State Government under R. 9 of the Indian Administrative Service (Cadre) Rules, 1954 for a period exceeding six months, is entitled to have his continuous period of officiation in a senior post, to be taken into account in reckoning the 'year of allotment' under R. 3 (3) (b) of the Indian Administrative Service (Regulation of Seniority) Rules, 1254 That depends on whether prior approval of the Central Government or the Union Public Service Commission to such appointment under sub— r (2) of R. 9 of the Cadre Rules for the appointment of a non-cadre officer to a cadre post by the State Government is a condition precedent for a valid appointment under R. 9 of the Cadre Rules, Further, the question is whether the existence of a vacancy in

the cadre strength of promotees, i. e. over-utilization of the State Deputation Reserve Quota is a relevant factor to be taken into consideration in determining the period of continuous officiation in a senior post on the cadre till the Central Government accords its approval to such appointment under R. 9 of the Cadre Rules in assigning the year of allotment under R. 3 (b) of the Seniority Rules.

3. Facts in these cases are more or less similar. It will suffice for our purposes first to state the facts in K. L. Jain's case. The respondent was a substantive member of the State Civil Serviee (Executive in the State of Madhya Pradesh. He was on November 7, 1975 temporarily appointed by the State Government to the post of a Collector which is a senior post on the cadre under R. 9 of the Indian Administrative Service (Cadre) Rules, 1954 and had been continuously officiating on such post w.e.f. November 10, 1975 till the Central Government accorded its approval on October 1, 1976, for his appointment in the Indian Administrative Service. The promotion quota of non cadre officers to cadre posts was 50 prior to October 1, 1976 but was on that date increased to 56. The respondent was formally appointed to the Indian Administrative Service by the Central Government on December 7, 1976. The State Government of Madhya Pradesh by letter dated February 3, 1979 informed the respondent he was assigned 1972 as the year of allotement by the Central Government. Feeling aggrieved, the respondent filed a petition before the High Court under Art. 226 of the Constitution for an appropriate writ, direction or order, directing that he should instead be assigned 1971 as his year of allotment under R. 3 (3) (b) of the Seniority Rules and his seniority should be fixed on that basis, and that on refixation of his seniority he be allowed the consquential reliefs to which he may be entitled.

4. The appellant contested the respondent's claim on three grounds, namely :(i) he was not entitled to count this continuous officiation in the senior post of Collector from November 10, 1975 as his appointment to such post in the cadre was not approved by the Central Government till October 1, 1976 i. e. for any period prior to October 1, 1976; (ii) there was no vacancy in the cadre strength of promotees for any period prior to October 1, 1976 and therefore the appointment of the respondent to the post of Collector for the period from November 10, 1975 to September 30, 1976 had to be ignored; and (iii) there was over utilization of the State Deputation Reserve Quota and for this reason also his continuous officiation on the senior post of a Collector could not be taken into account.

5. G. P. Singh, C. J. speaking for himself and Faizanudding J, in K. L. Jain v. Union of India, 1984 M P.L.J. 284 : (1984 Lab IC 374) held that though there was no specific approval of the Central Government to the appointment of the respondent, such prior approval was not a condition precedent for

a valid appointment to a cadre under R. 9 of the Cadre Rules and therefore the continuous officiation by the respondent as the Collector for the period from November 10, 1975 to September 30, 1976 could not be ignored on the ground that the appointment was not specifically approved by the Central Government. Further, it was held that the existence of a vacancy in the promotion quota of cadre officers was not a condition pre-requisite for making an appointment of a non-cadre officer to a cadre post under R. 9 of the Cadre Rules and therefore, merely that there was over-utilization of the State Deputation Reserve Quota had no bearing on the question of the validity of the appointment of the respondent on a cadre post. It also held that the condition of approval by the Central Government required by the proviso to Cl. (1) of S. III. of Schedule II of the Indian Administrative Service (Pay) Rules, 1954 was only for pay fixation and it had nothing to do with the validity of the officiation of a non-cadre officer in cadre post under R. 9 of the Cadre Rules. It, accordingly, allowed the writ petition filed by the respondent and held that his continuous officiation in a senior post of Collector from November 10, 1975 was in accordance with R. 9 of the Cadre Rules and the same must ensure for his benefit to give him seniority under R. 3(3) (b) of the Seniority Rules

6. In the connected case, G N. Tiwari and 19 other members of the Madhya Pradesh cadre of the Indian Administrative Service who had similarly been deprived of the benefit of their continuous officiation on their temporary appointment to the cadre post of a Collector by the State Government under R 9 of the Cadre Rules and had been assigned the year 1967 instead of 1966, the year 1968 instead of 1967, or the year 1972 instead of 1971 as the year of allotment under R. 3 (3) (b) of the seniority Rules also moved the High Court by a petition under Art. 226 of the Constitution based on the same grounds, and prayed for the grant of similar relief. A Division Bench consisting of J.S. Verma and C.P. Sen, JJ, following the decision in K.L Jain's case allowed the writ petitions filed by the aforesaid respondent and directed that they be assigned the years 1966, 1967 and 1971 as their years of allotment respectively under R 3 (3) (b) of the Seniority Rules as claimed by them, and their placement in the seniority list be accordingly revised It expressed the hope that State Government and the Central Government would give them all the consequential relief to which they may be entitled on re-fixation of their seniority Against the two judgments, the Union of India has preferred these appeals by special leave.

7. In support of the appeal, learned counsel for the appellant advanced two contentions, namely : (1) The respondents were not entitled to have their entire period of continuous officiation in a senior post under R. 9 of the Cadre Rules taken into account in assigning the years of allotment under R. 3 (3) (b) of the Seniority Rules as their

temporary appointment to such senior post in the cadre was subject to the prior approval of the Central Government under sub-r. (2) of R. 9 of the Cadre Rules, and (2) They as non-cadre officers were not entitled to appointment to the cadre post of a Collector because there was no actual vacancy in the cadre strength of promotees. It is urged that the power of the Central Government under sub-r (3) of R. 9 of the Cadre Rules to direct termination of appointment of a person other than a cadre officer appointed for a period exceeding three months is a larger power and necessarily carries within its ambit, the lessor power to direct curtailment of the period of officiation It is further urged that the respondents were not entitled to the benefit of continuoue officiation in a senior post to be taken into account in reckoning their year of allotment because there was no vacancy in the cadre strength of promotees. In fact, there was overutilizalion of State Deputation Reserve Quota. We are afraid, we cannot accept this line of reasoning.

8. The assignment of the year of allotment is governed by R. 3 of the Indian Administrative Service (Regulation of Seniority Rules, 1954. The relevant clause applicable to the respondents is that contained in R. 3 (3) (b) which reads as follows :

"3 (3). The year of allotment of an officer appointed to the Service after the commencement of these rules shall be—

(a) ... ...

(b) Where the officer is appointed to the Service by promotion in accordance with sub-rule (1) of rule 8 of the Recruitment Rules, the year of allotment of the junior most among the officers recruited to the Servic in accordance with rule 7 of these rules who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former :

Provided that the year of allotment of an officer appointed to the Service in accordance with sub-rule (1) of rule 8 of the Recruitment Rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officer recruited to the Service in accordance with rule 7 of these Rules so started officiating, shall be determined ad hoc by the Central Government in consultation with the State Government concerned :

Explanation 1 –In respect of an officer appointed to the Service by promotion in accordance with sub-rule (1) of rule 8 of the Recruitment Rules, the period of his continuous officiation in a senior post shall, for the purposes of determination of his seniority, count only from the date the inclusion of his name in the Select List or from the date of his officiating appointment to such senior post, whichever is later :

Explanation 2— An officer shall be deemed to have officiated continuously in a senior post from a certain date if during the period from that date to the date of his confirmation.

in the senior grade he continues to hold without any break or reverstion a senior post otherwise than as a purely temporary or local arrangement."

9. It is common ground that the post of Collector is a senior post It is not disputed that the respondents were continuously officiating in the senior post for long periods prior to the date of their appointment to the Indian Administrative Service. It is also not in dispute that if the entire period of continuous officiation by the respondents in the senior posts of Collectors were taken into account, they would be entitled to the year 1966 instead of 1967, the year 1967 instead of 1968 and the year 1971 instead of 1972 as the 'year of allotment' to them in accordance with R. 3 (3) (b) of the Seniority Rules.

10. The appointment of the respondents to the senior post of Collector was made in accordance with R. 9 of the Indian Administrative Service (Cadre) Rules, 1954. It is in these terms :

"9. Temporary appointment of non-cadre officers to cadre posts—

(1) A cadre post in a State may be filled by a person who is not a cadre officer if the State Government is satisfied —

(a) that the vacancy is not likely to last for more than three months, or

(b) that there is no suitable cadre officer available for filling the vacancy.

(2) Where in any State a person other than a cadre officer is appointed to a cadre post for a period exceeding three months, the State Government shall forthwith report the fact to the Central Government together with the reasons for making the appointment.

(3) On receipt of a report under sub-rule (2) or otherwise, the Central Government shall terminate the appointment of such person and appoint thereto a cadre officer, and where any direction is so issued, the State Government shall accordingly give effect thereto.

(4) Where a cadre post is likely to be filled by a person who is not a cadre officer for a period exceeding six months, the Central Government shall report the full facts to the Union Public Service Commission with the reasons for holding that no suitable officer is available for filling the post and may in the light of the advice given by the Union Public Service Commissian give suitable direction to the State Government concerned."

11. It is plain upon a construction of R. 9 that under sub-r.

(1) the State Government can direct that a cadre post may be filled by a person who is not a cadre officer if it is satisfied that the vacancy is not likely to last for more than three months or that there is no suitable cadre officer available for filling the vacancy. In these cases, admittedly, the appointments of each of the respondents who was a person other than a cadre officer to the senior post of Collector in the codre lasted for nearly a year or more and therefore exceeded the period of three months contemplated by Sub-r. (1) Such an appointment could be made

by the State Government on being satisfied that there was no suitable officer for filling the vacancy. It is not averred in the returns filed by the State Government or the Central Government in the High Court that this condition was not satisfied when the respondents were so appointed. Under sub-r. (2), where in any State a person other than a cadre officer is appointed to a cadre post for a period exceeding three months, the State Government is required to forthwith report the fact to the Central Government together with the reasons for making the appointment. From the documents filed by the State Government in the High Court. it appears that such a report was made by the State Government to the Central Government on June 26, 1976. The Central Government by letter dated Feberuary 19, 1977 asked for a consolidated proposal for approval of officiation of non-cadre offcers on cadre posts for the half year ending September 30, 1976. In compliance therewith, the State Government sent the required proposal on March 29, 1977. Under sub-r. (3), on receipt of a report under sub-r. (2) or otherwise, the Central Government may direct that the State Government shall terminate the appointment of such person and appoint thereto a cadre officers, and where any direction is so issued, the State Government shall accordingly give effect thereto. Under sub-r. (4), where a cadre post is likely to be filled by a person who is not a cadre officer for a period exceeding six months, the Central Government is required to report the full facts to the Union Public Service Commission with the reasons for holding that no suitable officer is available for filling the post and may in the light of the advice given by the Union Public Service Commission, give suitable direction to the State Government concerned in that behalf.

12. Interpreting the provisions of sub-rules (2), (3) and (4), the High Court in K.L. Jain's case (1984 Lab IC 374) rightly observed :

"In the instant case, the Central Government never directed the State Government to terminate the petitioner's appointment. It is also not the case that the U.P S.C. tendered any advice to the Central Government that the appointmnt be terminated. It is true that there is no specific approval of the Central Government to the appointment of the petitioner but that is not a condition precedent for a valid appointment under Rule 9 and the petitioner officiation in a senior cadre post from 10th November 1975 to 30th September 1976 cannot be ignored on the ground that the appointment was not specifically approved by the Central Government. The petitioner's said officiation cannot also be ignored on the ground that there was no vacancy during this period in the promotion quota of the cadre officers."

The High Court held that prior approval of the Central Government was not a condition precedent to the appointment of a non-cadre officer to a cadre post under R. 9 of the Cadre Rules.

It further held that the existence of a vacancy in the promotion quota was not a prerequisite for making such an appointment. The appointment of the respondent K. L. Jain to the Indian Administrative Service made by the Central Government on December 7, 1976 was on a post when there was admittedly a vacancy in the promotion quota of non-cadre officers, but his temporary appointment by the State Government to the post of Collector which is a senior post in the cadre under R. 9 on November 7, 1975 was at a time when there was no such vacancy in the promotion quota. It appears that the promotion quota of non-cadre officers to cadre posts was 50 prior to October 1, 1976 and was on that date increased to 56. Since the existence of a vacancy was not a condition precedent for making an appointment under R. 9 of a non-cadre officer to a cadre post; the High Court held that the respondent's officiation from November 10, 1975 to September 33, 1976, could not be held to be invalid or ignored. On the same reasoning, it held that the fact that the State Government had over-utilized the Deputation Reserve Quota during the aforesaid period, could have no hearing on the question of validity of his appointment on the cadre post. It then aded :

> ‘‘It may be that if the Central Government thought that the State Deputation Reserve Quota which gave rise to a vacancy of a cadre post, it could have directed the State Government to terminate the petitioner's appointment but such a course was never adopted. As the Central Government did not issue any direction to the State Government to terminate the petitioner's appointment, the appointment has to be held to be valid and given effect to.”

13. In that view, the High Court held that the respondents's continuous officiation in a senior post from November 10, 1975 was in accordance with R. 9 of the cadre Rules and the same must ensure for his benefit for reckoning his seniority under R. 3(3) (b) of the Seniority Rules. Further, it held that the requirement of approval of the Central Government as contained in the proviso to Cl. 1 of S. III of Schedule II of the Indian Administrative Service (Pay) Rules, 1954 cannot be imported into R. 9 of the Cadre Rules or R. 3(3) (b) of the Seniority Rules. The view expressed by the High Court in K.L. Jain's case (1984 Lab IC 374) was followed with approval in the later case of G.N Tiwari v. Union of India.

14. Where a person other than a cadre officer is appointed to the Service by promotion in accordance with sub-r. (1) of R. 8 of the Recruitment Rules, the year of allotment of the junior-most amongst the officers recruited to the Service in accordance with R, 7 of the Rules who officiated continuously in a senior post from a date earlier than the commencement of such officiation by the former, is the determinative factor in allocation of the year of allotment under R. 3(3) (b) of the Seniority Rules. Proviso thereto enjoins that the year of allotment of an officer appointed to the

Service in accordance with sub-r. (1) R. 8 of the Recruitment Rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officers recruited to the Service in accordance with R. 7 so started officiating, shall be determined ad hoc by the Central Government in consultation with the State Government concerned Explanation 1 to R. 3(3) (b) interdicts that in respect of an officer appointed to the Service by promotion in accordance with sub-r. (1) R. 8 of the Recruitment Rules, the period of his continuous officiation in a senior post shall, for purposes of determination of his seniority, count only from the date of inclusion of his name in the Select List, or from the date of his officiating appointment to such senior post, whichever is later. Explanation provides that an officer shall be deemed to have officiated continuously in a senior post from a certain date if during the period from that date to the date of his confirmation in the senior post he continued to hold without any break or reversion the senior post otherwise than as a purely temporary or local arrangements. In these cases, the respondents who were appointed to the service by promotion in accordance with sub-r. (1) of R. 8 of the Recruitment Rules were entitled under Explanation I to have the entire period of continuous officiation in a senior post, for the purpose of determination of their seniority, counted from the date of inclusion of their names in the Select List or from the date of their officiating appointment to such senior post, whichever was later. They were also entitled by reason of the legal fiction contained in Explanation 2 to have the entire period of their continuous officiation without a break in a senior post from the date of their officiating appointment to such senior post till the date of their appointment into the service, counted for purposes of determining their year of allotment under R. 3(3) (b) of the seniority Rules. It can not be said that their officiation in a senior post on the cadre for the periods in question was merely fortuitous or stopgap

15. We are not impressed with the submission that the power of the Central Government under sub-r. (2) to direct termination of appointment of a person other than a cadre officer to a cadre post for a period exceeding three months or more was a larger power and carried with it the power to direct curtailment of the period of officiation of such person. Obviously, the power to direct termination of the appointment of a non-cadre officer in a senior post is distinct from the power to direct curtailment of his period of officiation. There is no such provision made in the Cadre Rules empowering the Central Government to direct the curtailment of the period of officiation of a non-cadre officer on a cadre post for purposes of reckoning his year of allotment under R. 3(3)-(b) of the Seniority Rules. Such a power cannot be spelled out from sub-r. (2) of R. 9 of the Cadre Rules which confers power

on the Central Government to direct termination of appointment of a non-cadre officer to a cadre post. In the absence of such a provision, the impugned order passed by the Central Government appointing October 1, 1976 as the date from which the period of officiation is to be reckoned for determining the year of allotment under R.3 (3) (b) of the Seniority Rules was wholly arbitrary and capricious and therefore rightly struck down by the High Court. The failure of the Central Government to give a direction under sub-r. (3) of R. 9 to terminate the appointment of the respondents implies that their continuous officiation on a cadre post had the tacit approval of the Central Government, particularly in view of the fact that the Central Government by letter dated February 19, 1977 required the State Government to submit a consolidated proposal for approval of officiation of non-cadre officers on cadre posts for the half year ending September 30, 1976. This was followed by a report of the State Government dated March 29, 1977. The Central Government by order dated October 1, 1976 accorded its approval to their appointment in the Indian Administrative Service. Furthermore, the respondents as non-cadre officers could not be denied the benefit of continuos officiation in a senior post merely because the State Deputation Reserve Quota was over utilised: Harjeet Singh v. Union of India (1987) 3 SCR 459 : (AIR 1380 SC 1275) and Amrik Singh v. Union of India, (1983) 3 SCR 485.

19. The result, therefore, is that the appeals must fail and are dismissed. There shall be no order as to costs.

17. We are constrained to observe that although the judgment of the High Court in K.L. Jain's case (1984 Lab IC 374) was rendered as for back as September 9, 1983 and that in the case of G.N Tiwari on December 16, 1983, the direction issued by the High Court have not been implemented so far. We hope and trust that the Central Government will take steps to comply with the direction issued by the High Court forthwith.

Appeals dismissed.

IT IS THE ESSENCE OF DEMOCRACY
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Report No. 14 p. 01

D. P. Madon
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art. 14, 16—Revision of pay scales of Central Govt. employees —Denial of benefits to Instructors of National Fitness Corps on ground that proposal to transfer their services to State Govt. pending—Violative of Arts 14 and 16 —They continue to be Central Govt. employees till date of actual transfer and are entitled to benefits SCA No. 1753 of 1974, D/ 28-7-1976 (Bom) overruled. (Civil Services—Pay scale, revision of).

OBSERVED BY

A. P. Sen and D.P. Madon

Hon'ble Judges Supreme Court of India

IN

Spl. Leave Petn. (Civil) No. 12335 of 1985 decided on 20-12-1985 between Union of India and another, Petitioners v. R. G. Kashikar and another, Respondents.

TEXT

Order :—The short point involved in this Special Leave Petition directed against the judgment and order of the Karnataka High Court dated April 11, 1985 is whether the learned single Judge was right in issuing a writ in the nature of mandamus directing the petitioners to extend the benefit of the revision of pay-scales from January 1, 1967 to January 1, 1973 upon the view that denial to the respondent R.G. Kashikar, who was an Instructor Grade II in the National Fitness Corps, of the benefit of revision of pay-scales as accorded to all other Central Government employees, was tantamount to denial of equality before law or equal protection of law and was thus violative of Art. 14 of the Constitution.

2. Facts giving rise to the Special Leave Petition are these. In 1954, the Government of India in the Ministry of Education introduced the National Discipline Scheme which, in the year 1956, came to be redesignated as the National Fitness Corps. The respondent was appointed as an Instructor Grade II under the National Discipline Scheme in the year 1963. While the respondent was continuing as an employee of the Central Government, a proposal was made for the transfer of Instructors of the National Fitness Corps to the administrative control of the State Governments. Though the proposal for such transfer of the establishment of the National Fitness Corps to the administrative control of the State Governments was made as far back as in the year 1965, the actual transfer of the services of the respondent and other Instructors to that of the State Government of Karnataka took place with effect from August 1,

1976. Accordingly, the respondent became an employee of the State Government from the said date During this period, there were other revisions of pay-scales made in respect of employees of the Central Government, but the revision of pay-scales of Instructors on the establishment of the National Fitness Corps was not made by the Central Government. This was the third or the fourth occasion that the respondent knocked at the doors of the High Court for redressal of the wrong. The first writ petition filed by the respondent along with other Instructors in the National Fitness Corps allocated to the State of Karnataka, being Writ Petn. No.3375 of 1975 was decided by Venkataramiah, J. by his judgment dated November 5, 1975. The learned single Judge characterized the order passed by the Union of India, Ministry of Eucation & Social Welfare, Department of Education dated April 3, 1974 placing the services of the respondent and other Instructors at the disposal of the Director of Public Instructions, State of Karnataka as being one under Art. 258 (1) of the Constitution, but declined to issue a writ of mandamus for extending to them the benefit of revision of pay-scales applicable to the Central Government employees on the ground that there was nothing to show that they had made a demand on the Central Government for extending to them the benefits such as revision of pay-scales, etc., which were extended to all other Central Government employees saying that it was open to them to make a representation to the Central Government in that behalf In the meanwhile, the respondent had already made a representation to the Central Government on October 17, 1975 requesting the Government of India to consider and extend revision of pay scales to the Instructors as accorded to all other Central Government Servants and in particular to teachers of the Central Schools as per recommendations of the Third Pay Commission, complaining that Instructors under the National Fitness Corps was the only category of Central Government employees discriminated against.

3. Incidentally, the Third Pay Commission in its report stated :

> "The Instructor of the National Discipline Scheme who had jointed the National Fitness Corps are to be transferred to the State Governments The emoluments of the Instructors are to be protected. The transfer is said to be in the process of implementation under terms to be mutually agreed upon. Since this organisation is now in a transitional state, we do not think it would be necessary to recommend any revised pay-scales."

In accordance therewith the Government of India, Ministry of Education by letter dated November 20, 1975 addressed to Secretaries to the Education Departments of the State Governments a communication which stated inter alia that the pay-scales of Instructors of the National Fitness Corps allocated to the States would not be revised. Administrative control of the Instructors working in the State of Karnataka was taken over with effect from April 1, 1974 and they were absorbed in State serbice with effect from August 1, 1976.

3. In view of the aforesaid direction of the Central Government the respondent had no other alternative but to move the High Court again by another writ petition being writ Petn. No. 2079, of 1976 and the same was allowed by Rama Jois, J. by his judgment dated April 6, 1979, and he made the rule absolute. The learned single Judge expressed a view that there was no justification for not revising the pay-scales of the Instructors under the National Fitness Corps during the period while the proposal for transfer of the establishment of the National Fitness Corps to the State Government was under consideration of the Central Government and the State Government when the pay-scales of all other Central Government employees were being revised from time to time. He further pointed out that the proposal was given effect to only on October 31, 1976 i.e. it took nearly eleven years to implement the proposal and adsorb these Instructors in state service, and the delay in implementation of the proposal deprived the Instructors of the benefit of revision of pay-scales in the State Government service which they would have got had their services been transferred from the Central Government to the State Government immediately after the proposal was made or at any rate, before January 1, 1971 because the State Government also revised its pay-scales with effect from toat date. On account of this delay the Instructors were deprived of the benefit of revision of pay scales under the Central Government as well as under the State Government. Upon this view, he held that when a representation was made by the respondent to the Central Government, the Central Government should have considered the representation and passed a considered order as to why he was not entitled to a revision of pay-scales with effect from January 1, 1961. As no such order had been passed by the Central Government, he directed the Central Government to deal with the representation while reserving liberty to the respondent to approach the High Court if the order of the Central Government was against Ministry of Education by endorsement dated November 19, 1979 declined to consider the claim for revision of pay-scales on the ground that the Third Pay Commission had not made any recommendation for the revision of scales to the Instructors.

5. Again, the respondent aproached the High Court by a petition under Act. 226 of the Constitution being Writ Petition No. 5450 of 1980 which has been allowed by Doddakale Gowda, J. by his judgment under appeal. Petitioners adopted a stand before the High Court that the exclusion of Instructors and Supervisory staff of the National Fitness Corps from the benefit of revision of pay-scales by the Third Pay

Commission was based on an intelligible differentia which distinguished them from other classes of employees of the Central Government. The learned single Judge rejected the contention observing that failure to revise their pay-scales/or not to extend the benefit of revised pay-scales on other Central Government employees on the pretext that they were liabe to be transferred to the State service was arbitrary and irrational and has resulted in their being discriminated against without any reasonable classification. According to the learned single Judge, denial of such benefit to them amounted to denial of equality before law or equal protection of laws in violation of Art. 14 of the Constitution. Upon this view, following the course adopted by this Court in Randhir Singh v. Union of India, (1982) 3 SCR 298. (AIR 1982 SC 879), the learned single Judge issued a writ in the nature of mandamus directing the petition ers to extend the benefits of revision of pay-scales to the respondent between the period from January 1, 1967 to January 1. 1973.

6 We have heard learned Additinoal Solicitor-General appearing for the petitioners. He challenges the correctness of the view taken by the High Court and relies upon the judgmennt of Deshpande and Joshi, JJ. of the Bombay High Court in their judgment in Eknath Dattataya Ekbote v Union of India, (Spl. Civil Appln. No 1953 of 1974 decided on July 28, 1976) taking a view to the contrary. In rejecting the claim of Instructors like the respondent, the learned Judges observed. that all the Instructors were already discharging their duties in schools run or financed or aided by the State Government long before July 1, 1972. This according to them, had the effect of making it entirely the State Government's activity and dissociating the Central Government entirely from it. They added:

"The plain implication of traansferring the entire activity to the States, is to make the posts of such Instructors, like the petitioners before them, surplus in the Central Government." The learned Judges were therefore of the view that the posts of such Instructors on decentralisation of the activities were liable to be retrenched as being surplus. In that view, the learned Judges held that such Instructors ceased to be Central Government employees with effect from July 1, 1972, and added:

The exclusion, of the Instructors like the petitioner; from consideration in the matter of revision of pay scales, seems to us to have been founded on rational and reasonable basis. The Pay Commission was appointed to consider revision of Pay scales and dearness allowance for the employees of the Central Government. The Pay Commission was right in excluding the cases of the Instructors from the consideration on being found that they had ceased to be connected with any Central Government activity with effect from 1-7-1972 and were liable thereafter either to be absorbed in State Government service or to be retrenched."

7. Upon that view, the learned Judges held that it would have been idle for the Third Pay Commission to proceed with the revision of pay-scales of this category of Central Government employees who had virtually ceased to have any connection with the Central Government activity, although they accepted that the adoption of this course resulted in meting out differential treatment to a class of Government servants from the one meted out to its orher employees, and added :

"(M) ere difference in treatment may not necessarily be violative of Art. 16 as long as there exists some basis for the difference in treatment and such basis has some rational foundation."

8. We find it rather difficult to subscribe to the view expressed by the learned Judges that although the petitioners before them i.e. Instructors like the respondents here, as Central Government employees should have also been given the benefit of revised pay-scales, the proposal to transfer the establishment of the National Fitness Corps to the state Governments had the effect of decentralising the National Discipline Scheme and the Instructors had become surplus at the Centre. Nor can we support their conclusion that classification between the Central Governmet employees who work on Central Government activities and those who work on State Government aetivities, was founded on rational and reasonable foundation and therefore the Instructors belonging to the former class could be treated on a different basis in the matter of their by-scales and other benefits. The underlying fallacy of the reasoning lies in assuming that the Instructors under the Scheme ceased to be Central Government employees merely because of the proposal to transfer the establishment of the National Fitness Corps to the State Governments. They continued to be employees of the Central Government till the process of absorption was completed. Until then they were still retained in Central Government service although allocated to different States and as such employees they were entitled to be treated alike. In order to pass the test of permissible classification, two conditions must be fulfilled, namely :

(1) That the classification must be founded on an intellgible differentia which distinguishes persons or things that are grouped together from others who are left out of the group, and (2) That the difference must have a rational relation sought to be achieved by the Act. That test is clearly not fulfilled in the case of Instructors under the scheme. The distinction sought to be drawn by the learned Judges between in two classes of Central Government employeee i.e. those who work on Central Government activities and those who work on State Government activities, is without any rational basis and the Instructors under the Scheme could not be treated as a class distinct and separate. Such classification or differentiation of the Instructors under the Scheme as a class of Central Government employees for depriving them of the benefits in 'matters

D. P. Madon
Judge
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relating to employment' which expression includes matters relating to salary, periodical increments, leave, gratuity, pension, age of superannuation etc. although they continued to remain Central Government employees till the date of absorption, was per se discriminatory and violative of Arts. 14 and 16 of the Constitution. The judgment of the Bombay High Court in Eknath's case, supra, does not lay down good law and is accordingly overruled.

9. The Special Leave Petition is wholly devoid of substance and is accordingly dismissed with costs.

Petition dismissed.

Report No. 15 p. 01

O. Chinnappa Reddy
Judge
Supreme Court of India

OBSERVATION

New company was created wholly owned by the principle company with no assets of its own except those transferred to it by the principal company, with no business or income of its own except receiving dividends from shares transferred to it by the principal company—Held that the new company was formed as device to reduce the amount to be paid by way of bonus of workmen —The amount of dividend reeeived by the new Company should therefore be taken into account in assessing the gross profit of the principal company—Payment of Bonus Act (2) of 1965), Sec. 4.

OBSERVED BY

O. Chinnappa Reddy and
V. Khalid,
Hon'ble Judges Supreme Court of India

IN

Civil Appeal No. 1429 (NL) of 1975 decided on 19-8-1985 between the Workmen Employed in Associated Rubber Industry Ltd., Bhavnagar, Appellant v. The Associated Rubber Industry Ltd, Bhavnagar and an other, Respondents.

TEXT

Chinnappa Reddy, J. :--The workmen of The Associated Rubber Industry Ltd, Bhavnagar are the appellants in this appeal filed pursuant to a certificate under Art. 133 (1) of the Constitution granted by the High Court of Gujarat.

2. The Associated Rubber Industry Ltd. had purchased, some year back, shares of INARCO Ltd. by investing a sum of Rs, 4,50,000/- They. were getting annual dividends in respect of these shares and the amount so received was shown in the Profit and Loss Account of the company year after year. It was taken into account for the purpose of calculating the bonus payable to the workmen of the company. Sometime in the course of the year 1968, the company transferred the shares of INARCO Ltd. held by it to Aril Bhavnagar Ltd. (subsequently changed to the Aril Holdings Ltd.), a subsidiary company wholly owned by The Associated Rubber Inbustry Ltd. Aril Holdings Ltd had no other capital except the shares of INARCO Ltd transferred to it by the Associated Rubber Industry Ltd. It had no other business or source of income whatsoever except receiving the dividend on the shares of INARCO Ltd. The dividend income from the shares of INARCo Ltd. was not transferred to the Associated Rubber Industry Ltd. and therefore, it did not find place in the Profit and Loss Account of the company

with the result that the available surplus for the purposes of payment of bonus to the workmen of the company became reduced. The net result of the exercise was that bonus at the rate of 4% only was paid to the workers for the year 1969 instead of at the rate of 16% to which they would have otherwise been entitled. We may mention here that Aril Holdings Ltd. was itself wound up in the year 1971 and amalgamated with The Associated Rubber Industry Ltd.

3. The workmen of the Associated Rubber Industry Ltd, Bhavnagas raised an industrial dispute claiming that they were entitled to be paid bonus at the rate of 16% for the year 1969. According to them, the transfer of the shares of INARCO Ltd. to Aril Holding Ltd. was no more than a device to avoid payment of higher bonus to the workmen The Industrial Tribunal and thereafter the High Court of Gujarat under Art. 226 the Constitution held that The Assoeiated Rubber Industry Ltd and Aril Holdings Ltd. were two independent companies with separate legal existence and therefore, the profits made by Aril Holdings Ltd. could not be treated as profits of The Associated Rubber Industry Ltd. for the purpose of computing the gross profits earned by the Associated Rubber Industry Ltd. It was further held that there was no evidence to show that the transfer of shares to Aril Holdings Ltd. was only a device to avoid payment of bonus to the workmen.

4. It is true that in law The Associated Rubber Industry Ltd. and Aril Holdings Ltd. were distinct legal entities having separat existence. But in our view, that was not an end of the matter. It is the duty of the court, in every case where ingenuity is expended to avoid taxing and welfare legislation, to get behind the amoke screen and discover the true state of affairs. The court is not to be satisfied with form and leave well alone the substance of a transaction. In Commr. of Income-tax, Madras v. Sri Meenakshi Mills Ltd. (1967) 1 SCR 934 at 941 : the judicial approach to such problems was stated as follows :

"It is true that from the juristic point of view the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed of borne by its members. But in certain exceptional cases the Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade. For example, the Court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation. For instance, in Apthorp v. Peter Schoenhofen Brewing Co. (1899) 4 Tax Cas 41 the Income Tax Commissioners had found as a fact that all the property of the New York company, except its land, had been transferred to an English company, and that the New York company had only been kept in being to hold the land, since aliens were not allowed to do so under New York law. All but three of the New York company's shares were held by the English company, and as the Commissioner also found if the business was technically that of the New Yark company, the latter was merely the agent of the English company. In the light of these findings the Court of Appeal, despite the argument based on Saloman's case (1896) AC 22, held that the New York business was that of the English company which was liable for English income-tax accordingly. In another case Firestone Tyre and Rubber Co. v. Llewellin (1957) 1 WLR 464-an American company had an arrangement with its distributors on the Continent of Europe whereby they obtained supplies from the English Manufacturers, its wholly owned subsidiary. The English company credited the American with the price received after deducting the costs plus 5 per cent. It was conceded that the subsidiary was a separate Legal entity and not a mere emanation of the American parent, and that it was selling its own goods as principal and not its parent's goods as agent. Nevertheless, these sales were a means whereby the American company carried on its European business and it was held that the substance of the arrangement was that the American company traded in England through the agency of its subsidiary. We therefore reject the argument of Mr. Venkataraman on this aspect of the case." More recently we have pointed out in Mc Dowell and Company Limited v. Commercial Tax Officer (1985) 3 SCC 230.

O. Chinnnppa Reddy
Judge
Supreme Court of India

"It is up to the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of emerging techniques of interpretation as was done in Ramsay (1981) 1 All ER 865). Burman Oil (1982 STC 30) and Dawson (1984-1 All ER 530), to expose the devices for what they really are and to refuse to give judicial benediction."

"The fact that the court accepted that each step in a transaction was a genuine step producing its intended legal result did not confined the court to considering each step in isolation for the purpose of assessing the fiscal results".

Avoidance of welfare legislation is as common as avoidance of taxation and the approach in considering problems arising out of such avoidance has necessarily to be the same.

5. If we now look at the facts of the case, what do we find? A new company is created wholly owned by the principal companywith no assets of its own except those transferred to it by the principal Company, with no business or income of its own exept receiving dividends from shares transferred to it by the principal company and serving no purpose whatsoever except to reduce the gross profits of the principal company. These facts speak for themselves. There cannot be direct evidence that the second company was a device to reduce the gross profits of the principal company for

O. Chinnappa Reddy
Judge
Supreme Court of India

whatever purpose. An obvious purpose that is served and which stares one in the fact is to reduce the amount to be paid by way of bonus to workmen. It is such an obvious device that no further evidence, direct or cirumstantial. is necessary. It was argued that in 1971, the Aril Holdinas Ltd. was wound up and amalgamated with The Associated Rubber Industry Ltd. and that this circumstance showed that the initial creation of Aril Holdings Ltd. was not a device of avoidance But the learned counsel for the company was unable to explain why in the first instance Aril Holdinds Ltd. was created and why later it was wound up. probably, after Aril Holdings Ltd, was created, some unforseen difficulties arose which have not been brought to light before us and it became necessary to wind it up and amalgam it with The Associated Rubber Industry Ltd. We are therefore, satisfied that the amount of dividend from INARCO Ltd. received by the Aril Holdings Ltd. should be be taken into account in assessi the gross profit of the Associated Rubber Industry Ltd for the purpose of calculating the rate of bonus payable to the workmen of The Associated Rubber Industry Ltd. The appeal is allowed with costs and it is declared that the workmen of The Associated Rubber Industry Ltd. Bhavnagar are entitled to be paid bonus at the rate of 16 per cent for the year 1969.

Appeal allowed.

O. Chinnappa Reddy
Judge
Supreme Court of India

OBSERVATION

Reservation for Scheduled Castes—Sub Inspectors is Delhi Police Force—Appointment of—It is not permissible to reserve any vacancy for departmental candidates belonging to the Scheduled Castes while 15 per cent of the total number of vacancies available for direct recruitment—Delhi Police Rules, R. 7—Constitution of India, Art 309.

OBSERVED BY

O. Chinnappa Reddy and V. Balkrishna Eradi

Hon'ble Judges Supreme Court of India

IN

Civil Appeal No. 163 of 1986 (Arising out Spl. Leave Petn. (Civil) No. 1077 of 1985) decided on 17-1-1986, between Mahavir Singh, Appellant v. Staff Selection Committee and another, Respondents.

TEXT

Chinnappa Reddy, J.:—Special leave greanted.

2. The petitioner belongs to the Scheduled Castes. He joined the Delhi Police as a Constable on May 18, 1979. He became a Graduate in 1981. On October 10, 1981, the Staff Selection Committee invited applications for filling up vacancies of posts of Sub-Inspectors of Police on the basis of a competitive examination. There were altogether 170 vacancies. The break up of the vacancies, General and Reserved, Departmental and Nondepartmental, as admitted by the respondents was as follows:--

	Non-departmental	Departmental	Total
(i) General	98	12	110
(ii) Scheduled Caste	22	3	25
(iii) Scheduled Tribe (includ–ing 5 C.F.)	16	2	18
(iv) Ex-servicemen	17		17
	153	17	170

The petittoner who appeared at the competitive examination was selected for appointment against one of the three vacancies reserved for Scheduled Castes from Deqartmental candidates He was, however, not appointed on the ground that under the Rules as interpreted by the Delhi High Court in Raj Kumar

Singh v. Union of India, there could be no further reservation for candidates belonging to the Scheduled Castes in the quota available to departmental candidates. A writ petition filed by the petitioner was dismissed by a Division Bench, who considered themselves bound by the decision in Raj Kumar Singh v. Union of India (supra). Hence the appeal by special leave.

3. Rule 7 of the Delhi Police Rules is as follows :

"Recruitment of S.I. (Executive) – Fifty per cent of the vacancies in the rank of S. I. and executives shall be filled by direct recruitment and 50% of the vacancies by way of promotion. Wut of 50% direct quota 10% of the posts shall be filled through the deptt. candidates viz. the constables, head constables and the A. S. I. of not more than 30 years of age having the requisite qualifications and standards through the examinations for the departmental candidates by the SSC in accordance with relevant rules."

"Education, Physical and other standards for the posts of Sub-Inspector (direct recruited) shall be as under :–

(1)	Age 23-25 years		Relaxable by 5 years only for Scheduled Castes/Scheduled Tribes and departmental candidates.
(2)	Height 170 centimetres		Relaxable by 4 cms. only for residents of hill areas e. g. Gorakhas, Garhwalis.
(3)	Chest 81 centimetrs to 85 centimetres		Relaxable by 2 cms for residents of hi areas.
(4)	Educational Qualification	Degree from a recognised University	No relaxation
(5)	Physical standard	Sound health free from defect/deformity/disease both eyes vision 6/12 (without glasses. No colour bindness)	No relaxation
(6)	Reservation	(i) For Scheduled Cas es/Sehedulde Tribe and Ex-serviceme etc. as per order issued by Gov from time to time. (ii) For departmenta candidates 10% o vacancies."	

4. According to the interpretatio placed upon the Rule by the Delhi Hig Court while 15 per cent of the tota number of vacancies available for direc recruitment are reserved for Scheduled Castes, it is not permissible to reserv any vacancy for departmental candidate belonging to the Scheduled Castes. According to the High Court that Castes a double advantage. We fail to see how a get they double advantage. If we look at the break up given by the Respondents

E.S. Venkataramiah
Judge
Supreme Court of India

themselves, we see that out of a total of 170 vacancies' 15% of 170, that is, 25 vacancies are reserved for Scheduled Castes. Out of the 25 vacancies so reserved for Scheduled Castes, 10% of 25, that is 3 (correcting 2.5 to the nearest numeral) are reserved for departmental candidates belonging to the Scheduled Castes. The reservation for Scheduled Castes and departmental cadidates operate vertically and horizontally. The reservation for departmental candidates is not in addition to the reservation for Scheduled Castes. We are told that was how the department itself was interpeting the rule until their interpretation was upset by the Delhi High Court in Raj Kumar Singh's case. We do not agree with the interpretation placed by the Delhi High Court. We allow the appeal with coste and direct the Respondents to appoint the petitioner as Sub-Inspector of Police (Executive) with effect from the date on which the petitioner would have been appointed but for the misinterpretation of the Rule and give to him all the benefits that would have accrued to him thereafter.

Appeal allowed.

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Report No 17 p. 01

E. S. Venkataramiah
Judge
Supreme Court of India

OBSERVATION

Promotion—Persons promoted to posts in violation of rules--Persons have been llowed to function in higher posts for 15 to 20 years with due deliberation--It would e unjust to revert--Entire period of officiation to be counted for seniority--Indian Economic Service Rules, 1961, R. 8 (1) (c) (ii) and R. 16. Indian Statistical Service. Rules, 1961, R. 8 (i) (c) (ii) and R. 16

OBSERVED BY

O. Chinnappa Reddy and E. S. Venkataramiah,
Hon'ble Judges Supreme Court of India

IN

Civil Misc. Petn. No. 2604 of 1985 in Writ Petn. No. 1595 of 1979, decided on 11-2-1986 between Narender Chadha and others, Petitioners v. Union of India and thers, Respondents.

TEXT

Venkataramiah, J.:— The perennial lispute regarding seniority between lirect recruits and promotees which xists in almost all the departments of Government has not spared the Indian Economics Service and the Indian Statistical Service with which we are concerned in this case. This the second phase of the battle which is being waged in this Court Earlier certain persons who had been holding posts in Grade IV of these two Services had filed writ Petition No 1595 of 1979 under Art. 32 of the Constitution of India praying for a writ, direction or order in the nature of mandamus directing the Union of India to confirm/regularise the petitioners in the posts held by them as and from the dates when they became due for confirmation or regularisation in accordance with the Indian Economic Service Rules, 1901 of the Indian Statistical Service Rules, 1961 and to consider them for all future promotions when due on the basis of such seniority. The said petition was filed in a representative capacity with the leave of the Court under O. I. R. 8 C. P. C. A few officers who had been recruited as direct receuits to the posts in Grade IV in the said departments were impleaded as respondents and they were sued in a representative capacity as representing all other direct recruits who were likely to be affected by the decision. After the above case was heard, the Court passed a short order on Feb. 1, 1984 which reads thus :

"We are not able to understand why the vacancies available to the departmental candidates under R. 8 (ii) of the Indian Economic and Indian Statistical Services Rules, 1961, have not been filled up on regular basis. We find that some of the departmental candidates (petitioners) have been holding the promotional posts on ad hoc basis for several years. There appears to be no justification for keeping them ad hoc' so long. We, therefore, issue a writ of Mandamus directing the Union of India to fill up, within four weeks from today, the vacancies available to the departmental candidates under R. 8 (ii) with effect from the date from which the petitioners became entitled to be promoted on regular basis. Their seniority will be determined according to Rules. We wish to make it clear that there is no question of any rotation system being applied under the Rules, as they exist now. The writ petition is disposed of in these terms. There will be no order as to costs."

(Rule 8 (ii) has to be read as R 8 (1) (a) (ii))

2. The Union of India, as can be seen from the order set out above, was directed to comply with the directions contained therein within four weeks from the bate of the order. On the expiry of four weeks, stipulated by this Court, the Union of India filed an application for extension of time to comply with the directions contained therein fully. Time was extended by the Court till April 30, 1984. On May 1, 1984 the Union of India filed before the Court fwo sets of seniority lists in respect of the above two Services, namely, lists based on the principle of rotation and lists based on Rule 9-c of the Indian Economic Service/India Statistica Service Rules. Since on a perusal of th said lists it was found that the positio of some of the departmental promotee who had already put in nearly 15 yea of service in Grade IV was worse tha the position in which they were befor the writ petition was filed and wer facing imminent threat of reversion t the feeder posts from which they ha been promoted several years ago, th Court directed the petition to come u for hearing before the Court on its reopening after summer vacation an directed that status quo should be maintained in the meanwhile. Then on Jul 34, 1984 the Court while declining t endorse either of the two senioity list directed the the Union of India t implement the order dated February 1 1984 on or before 30th November, 1984 In the meanwhile the petitioners filed Civil Miscellaneous petition No. 2604 of 1985 complaining that the Union o India had failed to comply with the order made by this Court and that action should be taken for contempt agains it. While opposing the application fo contempt, on benalf of the Union o India it was stated in the, course of the affidavit sworn by Shri P. L. Sakarwal, Deputy Secretary, Department of Economic Affairs, New Delhi thus :

"23. In view of the submissions made above this Respondent would urge that the directions of the Hon'ble Court dated 1-2 1984 in the matter of (i) filling vacancies under R. 8 (ii) to fix the seniority according to Rules without the application of rotation System, have een complied with bona fide and in a ood faith. R. 8 (ii) of the TES Rules/ SS Rules provides for the quota for ie departmental promotees and also he manner in which the Select List for romotion by a duly constituted DPC resided over by a Member of UPSC has ɔ be drawn All the vacancies available ɔ the departmental candidates R. 8 (ii) p to the end of 1983 have already been iven to them by issuance of Select ists drawn from time to time ction is in proces to prepare further elect List in respect of the vacancies vailable to the officers till the end of ie year 1984. As regards seniority, ie Hon'ble Court had to fix the senior-y according to the Rules and without ie application of the rotation system 'he revised seniority lists prepared by is Respondent and finalised after iviting objections etc. from the oncerned officers have been framed ccording to the Rules i.e. in terms of ie provisions of R. 9-C of the IES ules/ISS Rules and without applicat-on of the rotation system. This Resp-ndent would, therefore, urge with espect and all humility that he has omplied with the directions of the Ion'ble Court bonafide and in good aith. However, if there is any slip on he part of this Respondent in arrying out the directions of this Ion'ble Court or if the Hon'ble Court onsiders that the orders should have een executed in any other manner, this Respondent would tender unconditional pology and will be duty bound to bey and implement, such orders/direct ons as this Hon'ble Court may deem fit or pleased to issue in the circumstances of the case."

3. In the meanwhile certain direct recruits also intervened in the course of the said petition and requested that they should be heard before any order was passed by the Court on the Contempt application. While the order passed by the Court on February 1, 1984 did not require any clarification at all. since the parties tried to place different interpretations on it, prayer was made by the Union Government as stated above seeking further clarifications in the light of certain recent decisions rendered by this Court, we gave apportunity to all the parties to make their submissions once again. Availing themselves of the opportunity given by the Court learned counsel for the promotees and the direct recruits have virtually reargued the matter. It should be stated here that no specific stand was taken on this occasion by the Union Government exeept bringing to the notice of the Court the relevant provisions of law. On its behalf it was submitted very fairly by Shri F.S. Nariman, that there was no intention on the part of the Government or any of its officers to flout the order of the Court passed earlier and that if the Court found that there has been any mistake in the preparation of the lists of seniority, those lists would be prepared afresh in the light of any direction that may be given by the Court in the course of these proceedings. Having regard to the facts of the case and the events that have oc-

llowed the order passed by this Court on February 1, 1984, we do not feel called upon to take any action for contempt against the Union Government or any of its officers for not obeying the orders of this Court. We have, however, found it necessary to consider the matter again in the light of the submissions made by the parties and issue fresh directions in this case. We feel that a detailed order is also called for in the circumstances of the case.

4. The Indian Economic Service Rules, 1961 and the Indian Statistical Service Rules, 1961 (hereinafter referred to as 'the Rules') which are more or less identical with regard to the questions involved in this case were notified on November 1, 1961 and these Services were constituted effect from that day by encadering numerous posts carrying economic and statistical functions in the various ministries of the Government of India. These Services were meant to comprise a pool of officers having appropriate qualifications for performing the aforesaid technical functions involved in various posts. The strength of the various grades of the Indian Economic Service at the initial constitution of the Service, i.e., on Novermber 1, 1961 was Grade 1-15, Grade II-15. Grade III-95 and Grade IV-199—Total 324 posts. The strength of the various grades of the Indian Statistical Service at the initial constitutions of the Service i.e. on November 1, 1961 was Grade 1-8, Grade II-7, Grade III-54 and Grade IV-116—Total 185 posts.

5. The officers of Grade 1 to Grade IV are classified as Class-1 Officers. The authorised permanent strength of each of the Services is to be fixed by the Controlling Authority with the guidance of the Ministry of Finance in accordance with the provisions of the Rules. It is required to be based on following principles :

(1) it shall be assumed that 80 per cent of the total number of semi-permanent posts are likely to be continued indefinitely in one form or another and shall be provided for in the permanent strength; and

(2) all the purely temporary posts and 20 per cent of the semi-permanent posts shall be excluded for purposes of determining the permanent strength.

6. The Ministery of Home Affairs (Dedartment of Personnel and Administrative Reforms) advised by a Board known as the Indian Economic Statistical Service Board is designated as the Controlling Authority under R. 6 of the Rules Initial constitution of both the Services was required to be done in accordance with R. 7. Under that Rule the Union Public Service Commission was required to constitute a Selection Committee with a Chairman or a Member of the Commission as President not more than two representatives or the participating ministries

nd the Chief Economic Adviser in he Ministry of Finance (Department f Economic Affairs) to determine the uitability of departmental candidtes for appointment to the different rades and to prepare an order f preference for each grade for the initial constitution of the Service On eceipt of the Committee's report the Commission was required to forward ts recommendations to the Government nd such recommendations might inclde a recommendation that a person onsidered suitable for appointment to grade might, if a sufficient number f vacancies were not available in that rade, be appointed to a lower grade. The departmental candidates who were ot absorbed at the initial constitution f the Service were to continue to work s on the date of the initial constitutios nd were given the opportunity to apply and getting selected if they were found uitable) for future vacancies. We are nformed that the notifications regarding he initial constitution of these two Services were issued by the middle of February, 1964 with effect from Februry 15, 1964. Future maintenance of hese two Services is governed by Rule 8 of the Rules. Initially R. 8, which s relevant for the purposes of this case ead as follows :

“8 (1) Future maintenance of the Service--After the initial constitution of the Service has been completed by appointment of departmental candidates or otherwise, vacancies shall be filled as hereinafter provided.

(a) Grade IV—Assistant Director-

(i) Not less than 75 per cent of the vacancies in this grade shall be filled by direct recruitment through an open competitive examination to be held by the Commission in the manner prescribed in Sch II. Provided that 25 per cent of the said quota for direct recruitment may be set apart for a maximum period of 5 yeare for absortion of officers considered suitable for appointment at the initial constitution of the Service but who could not be so appointed in the absence of vacancies.

(ii) Not more than 25 per cent of the vacancies in this grade shall be filled by selection from among officers serving in offices under the Government in Economics pasts recognised for this purpose by the Controlling Authority who shall prepare a list of such posts in consultaion with the Commission The Controlling Authority may, in consultation with the Commission, add to or modify the list from time to time. The selection will be made from amongst those who have completed at least 4 years of service in those posts on the basis of merit with due regard to seniority by the Controlling Authority on the advice of the Commission ....”

Rule 8'1) (a) now reads thus :=

“8 (1) Future maintenance of the service; after the initial constitution of the service had been completed by appointment of departmental candidates or otherwise and after promotions in accordance with sub-rule (2A) of R. 7 have taken place, vacancies shall be filled as hereinafter provided.

(a) Grade IV—Assistant Director.

(i) Not less than 75 per cent of the vacancies in this grade shall be filled by direct recruitment through an open competitive examination to be held by the Commission in the manner prescribed in Sch. II. Provided that 25 per cent of the said quota for direct recruitment may be set apart for a maximum period of 5 years for absorption of officers considered suitable for appointment at the initial constitution of the service but who could not be so appointed in the absence of vacancies.

(ii) Not more than 25 per cent of the vacancies in this grade shall be filled by selection from among officers serving in offices under the Government in Economic posts recognised for this purpose by the Controlling Authority who shall prepare a list of such posts in consultation with the Commission. The Controlling Authority may, in consultation with the Commission, add to or modify the list from time to time. The selection will be made from amongst those who have completed at least 4 years of service on a regular basis in these posts on the basis of merit with due regard to seniority by the Controlling Authority on the advice of the Commission :

Provided taht if any junior person in an office under the Government is eligble and is considered for selection for appointment against these vacancies, all persons senior to him in that office shall also be so considered notwithstanding that they may not have rendered 4 years of service on a regular basis in their posts."

7. After the initial constitution of the two Services was completed it was found that a number of posts carrying Economic/Statistcal functions could not be considered for inclusion in the officers' Grade due either to misunderstanding or to inadvertence. Further as the process of formation of the Indian Economic Service and the Indian Statistical service was prolonged for a number of years and the need for appointing more officers in the said Departments during that long period also arose gradually several posts carrying economic/statistical functions were created Although R. 8 provided that not less than 75 per cent of the vacancies in Grade IV should be filled up by direct recruitment through an open competetive examination to be held by the Union public Service Comission in the manner prescribed in Sch. II to the Rules and further provided that not more than 25 per cent posts of the vacancies in that grade should be filled by selection from among officers serving in the offices under the Government in Economic/Statistical posts recognised for that purpose by the Controlling Authority, no direct recruitment was resorted to till about the year 1968. In the meanwhile a large number of persons in the feeder posts were appointed to the posts in Grade IV from time to time from the year 1962 onwards although the orders promoting them stated that they had been promoted only temporarily. It is not disputed that all those promotees have been holding

se posts continuously till now with- being reverted to the feeder posts n which they had been promoted. ne have retired from those posts on ining the age of superannuation.

8. We shall reproduce below one he notifications issued in connection h the promotion to the posts in de IV of such officers, some of om are the petitioners in this petit- It reads thus :

"GOVERNMENT OF INDIA
ANNING COMMISSION

Yojana Bhawan, Parliament Street
New Delhi-1, the 20th/23rd Novem-
'65

NOTIFICATION

No. F. 8 (10)/65-ADM. I : The sident is pleased to appoint the owing Economic Investigators Grade Planning Commissian, as Resarch cers in the Commission in a tempor- capacity with effect form the 6th vember 1965 (forenoon), and until ther orders : —

Shri. K. V. Vishwanathan
Shri S. N. Padru
Shri C. L. Kapur
Smt. K. Passi
Shri Narendra Chaddha
Shri R. N. Mokhey
Shri N. Srinivasan
Shri K. Suryanarayana
Shri P. N. Radhakrishnan
Shri B. R. Kharbanda
Shri Kamla Prasad
Shri M. M. Gupta
Shri S. P. Kumar

Sd/—
(N. S. Gidwani)
Deputy Secretary
to the Government of India.

All these officers excepting Shri P. N. Radhakrishnan are either permanent or quasi-permanent in the grade of Economic Investigators, Shri Radha kishnan is quasi-permanent in the grade of Senior Computor. The promotion of all is in the direct line.

... ...

9. In another order of promotion issued while promoting another offcer by name Jagdish Chandra on November 21, 1966 it was mentioned that his promotion to the post of Research Officer was in direct line of Economic Investigator Grade I/II. It should be stated here that although R. 8(1) (a) provided that not less than 75 percent of the vacancies in Grade IV of the two Services should be filled up by direct recruitment through an open competitive examination to be held by the Commission in the manner prescribed in Sch. II to the Rules and that not more than 25 per cent of the vacancies in the Grade could be filled up by a selection from among officers serving in offices under the Government in Economic/Statistical ports recognised for this purpose by the Controlling Authority, the prescribed quota of appointment from the two different sources, referred to above, was not maintained right from the commencement of the Constitution of the Services. The initial const-

itution of the two Services was completed under R. 7 of the Rules with effect from February 15, 1964 as mentioned earlier. Therefore R. 7-A was added. That rule was added by a notification dated December 24, 1966 and it has been amended subsequently by a notification dated February 12, 1972 Rule 7A made special provision regarding certain departmental candidates who were to be absorbed in the two Services. It provided that notwithstanding anything contained in R. 8 of the Rules the Controlling Authority on the advice of the Board should constitute a Selection Committee for the purpose of appointing officers who were departmental candidates to the Services in question. A departmental candidate who was not selected for appointment for any grade in the Services could continue to hold the post which he was holding then and might be considered by the Controlling Authority on the advice of the Board for appointment to the service at the subsequent stage or stage in consultation with the Commission. It further provided that any departmental candidate, referred to in sub-rule (1) of R. 7-A who did not on a selection to any Grade in the Service desire to be absorbed in the service might continue to hold the post held by him immediately before the selection as if he had not been selected. The validity of R. 7A was questioned by some of the direct recruits, who were appointed in the year 1968 in the High Court of Delhi by a Writ Petition. We understand that the said writ petition has been transferred to the file of the Central Administrative Tribunal and the said writ petiti on is still pending. We are not concer ned here with the merits of contention urged by the contesting parties in thos proceedings. We are concerned in thi case only with the question of seniorit as between direct recruits and promotees.

10. From the statements annexe to the counter-affidavit filed by Shri Subramanian, Director in the Depart ment of Economic Affairs, it is see that in the Indian Economic Servic there were 3 vacancies for direct recru its in the year 1964, 18 in the year 196 80 in the year 1966 and 12 in the yea 1967. Nobody was recruited directl to those posts during those years. I the year 1968 there were 11 vacancie for direct recruits but 32 were recruite directly during that year. In 1969 ther were 6 vacancies for direct recruits an 31 were recruited, in 1970 there wer 33 vacancies for direct recruits, in 197 there were 12 vacancies for direct recruits, in 1973 there were 25 vacancie for direct recruits, in 1974 there wer 20 vacancies for direct recruits and i 1975 there were 11 vacancies for direc recruits. By the year 1984 in all ther were 435 vacancies for direct recruit out of which only 342 posts were fille up by direct recruitment. In all 93 post intended for direct recruits remaine unfilled and most of them were held al along by persons who had been promoted from the feeder posts. The positio in the Indian Statistical Service was mo or lese the same. As against a total o 303 vacancies meant for direct recruit

etween the years 1964 and 1984 only 75 direct recruits were appointed In his department also the posts which emained unfilled been held by the ersons who were departmental candidtes It is alleged in the counter-affidait filed on behalf of the Union of India f which the deponent is Shri P. G. ele, Deputy Secretary in the Departnent of personal and Administrative eforms that many of the depaitmental andidates had been allowed to hold osts including in Grade IV of the foresaid Services purely on ad hoc and x gratis basis. The relevant part of ne counter-affidavit is to be found in aragraphs 21 to 24 thereof It is nfortunate that even though the romotees have been discharging eir duties to the best of their bility and receiving salary and allwances from the Government for the rvices rendered by them, it is alleged the course of the said counter-affidat that was being paid to them was by ay of grace This statement adds sult to injury. If the Government felt at they were not competent to dischae their duties and they had not been ppointed permanently to the posts held them, it was open to it to rever them their posts from which they had been omoted leaving it open to them to estion the orders of reversion in ourt The Government was in need their services and the petitioners ave been holding these posts for early 15 to 20 years. It is not say at this distance of time that e Government was only keeping them in their posts as a matter of grace. Be that as it may, it is seen that the Departmental promotion Committee met only thrice between 1956 and 1984, i. e. in 1970, 1972 and 1884 although under the rules and instructions issued by the Central Government on the advice of the Union Public Service Commission. the Departmental promotion Committee had to meet annually. When the Departmental Promotion Committee met in the year 1970, it prepared a select list consisting of 33 names to fill 33 vacancies only in Grade IV from amongst those who had already been ptomoted to Grade IV temporarily and at that time only officers who had completed four year of regular service in the feeder posts as on December 31, 1966 were considered although the Departmental Promotion Committee was meeting in the year 1970. If it had taken into consideration the service put in by the departmental candidates till the date on which it took up their cases for consideration for promotion many other who had been promoted on a temporary basis to Grade IV would have become eligible for consideration By omitting to take the cases of those persons into consideration on the ground that they had not completed four years of regular service in the feeder posts as on December 31, 1966 the Departmental Promotion Committee violated Arts. 14 and 16 (1) of the Constitution of India. It is further seen that the Departmental Promotion Committee made its recommendations on the basis of the records of service and seniority of each of the departmental candidate. It is not known whether any of them were found to be unfit on the basis of their record of service only. It is, however, seen that the select list contained only 33 names because the Departmental Promotion Committee felt that there were the only vacancies for which it could make recommendations under R. 8 (1) (a) (ii) of the Rules, If it had made recommendations to the Government in respect of all the vacancies which were available then, perhaps, the names of some others who were left out would have been included in the select list. Then after an interval of 12 years the Departmental Promotion Committee met in the year 1982 There again the same procedure was followed and the next meeting of the Departmental promotion Committee, as already stated, was in 1984. For no fault of the petitioners and the officers similarly situated their cases for promotion were not considered every year and even those who have been found fit by the Departmental Promotion Committee for promotion had to wait for nearly 15 years to get into the 'regular' service through a select list prepared by the Departmental Promotion Committee.

11. compliance with our direction the Government has produced before the Court two lists showing the name of officers who were appointed to Grade IV posts of Indian Economic/Statistical Service either regularly or on ad hoc basis arranged according to the dates from which they have been officiating in these posts continuously.

12. A large number of decisions were cited at the Bar by the l arned counsel for the parties Some of them are S. B. Patwardhan v. State of Maharashtra. (1977) 3 SCR 775, Rajendra Narain Singh v. State of Bihar, (1980) 3 SCR 450 Baleshwar Dass v. State of U. P. (1981) 1 SCR 449. A. Janardhana v. Union of India, (1983) 2 SCR. 936. P. S. Mahal v. Union of India, (1983) 3 SCR 847, O. P Singla v Union of India, (1985) 1 SCR 351 Karam Pal v. Union of India, (1985) 3 SCR 271, G S Lamba v. Union of India, (1985) 3 SCR 431, Pran Krishna Goswami v. State of West Bengal, (1985) Supp SCC 221 and D.K. Mitra v. Uuion of India, (1985) Supp SCC 243. We have carefully considered all the decisions cited before us.

13. It is now well-settled that it is permissible for the Government to recruit persons from different sources to constitute a service. It is also open to it to prescribe a quota for each source. Rules of recruitment framed on the above lines are perfectly legitimate and quite consistent with Arts 14 and 16 of the Constitution. It is also true that when the Rules of recruitment prescribe recruitment from different Services in accordance with the specified quota the Government is bound to appoint persons to the Service concerned in accordance with the said Rules. The seniority of persons recruited from different sources will have to be regulated accordingly. So far there can be no controversy. But

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Judge
Supreme Court of India

e are faced in this case with the pro-
em of resolving conflicts which have
isen on account of a violent depart-
e made by the Government from the
ules of recruitment by allowing those
no were appointed contrary to the
ules to hold the phsts continuously
er a long period of time. The
estion is whether after such a long
riod it is open to the Government
place them in seniority at a place
wer than the place held by persons
no were directly recruited after they
d been, promoted, and whether it
ould not violate Arts. 14 and 16 of
e Constitution if the Government is
lowed to do so. Promotions of offi-
rs have been made in this case deli-
rately and in vacancies which have
sted for a long time. A letter dated
ugust 11, 1978 written by Shri S.D.
atil, Minister of State for Home
ffairs, Personnel Department to Shri
anga Bhakt Singh, Member of Parlia-
ent substantiates the conclusion. The
levant part of the letter reads :

"Government resorted to making
l hoc appoinments as it was separ-
ely considering proposals to reorga-
se Grade IV of the two Services.
ending such reorganisation Govt.
as taken a deliberate decision to rest-
ct direct recruitment for the pre-
nt. It is, therefore, not correct to
y that ad hoc appointments have
en made due to non-availability of
irect recruite. I may add that but
r this deliverate decision, most of
e officers holding ad hoc posts in
rade IV would have continued to
stagnate in the lower posts of Investigators"

14. At one stage it was argued before us on behalf of some of the respondents that the petitioners who have not been appointed in accordance with R. 8(1) (a) (ii) could not be treated as members of the Indian Economic Service or of the Indian Statistical Service at all and hence there was no question of determining the question of seniority as between the petitioners and the direct recruits. This argumant has g t to be rejected. It is true that the petitioners the actual prescribed under R. 8(1) (a) (ii) but the fact remains that they have been working in posts included in Grade IV from the date on which they were appointed to these posts. The appointments are made in the name of the president by the competent authority. They have been continuously holding these posts. They are being paid all along the salary and allowances payable to incumbents of such posts. They have not been asked to go back to the posts from which they were promoted at any time since the dates of their appointment. The orders of promotion issued in some cases show that they are promoted in the direct line of their promotion. It is expressly admitted that the petitioners have been allowed to hold posts iucluded in Grade IV of the aforesaid services, though on an ad hoc basis. (See Para 21 of the counter-affidavit filled by Shri P.G. Lele, Deputy Secretary, Department of Per-

sonnel and Administrative Reforms). It is, therefore, idle to contend that posts in Grade IV of the two Services in question. It is significant that neither the Government has issued orders of reversion to their former posts nor has anybody so for questioned the right of the petitioners to continue in the posts which they now holding It would be unjust to hold at this distance of time that on the facts and in the circumstances of this case the petitioner are not holding the posts in Grade IV. The above contention is therefore without substance. But we, however, make it clear that it is not our view that whenever a person is appointed in a post without following the Rules prescribed for appointment to that post, he should be treated as a person regularly appointed to that post. Such a person may be reverted from that post But in a case of the kind before us where persans have been allowed to function in higher posts for 15 to 20 years with due deliberation it would be certainly unjust to hold that they have no sort of claim to such posts and could be reverted unceremoniously or treated as persons not belonging to the Service at all, particularly where the Government is endowed with the power to relax the Rules to avoid unjust results. In the instant case the Government has also not expressed its unwillingness to continue them in the said posts. The other contesting respondennts have also not urged that the petitioners should be sent out of the said posts The only question agitated before us relates to the seniorit as between the petitioners and the direct recruits and such a question can arise only where there is no dispute regarding the entry of the officers concerned into the same Grade. In the instant case there is no impediment even under the Rules to treat these petitioners and others who are similarly situated as persons duly appointed to the posts in Grade IV because of the enabling provision contained in R 16 thereof. Rule 16 as it stood at the relevant time read as follows :

"16. The Government may relax the provisions of these rules to such extent as may be necessary to ensure satisfactory working or remove inqeuitable results."

Now Rule 16 reads thus :

"16. Powers to relax: The Government may in consultation with the Commission and for reasons to be recorded in writing relax any of the provisions of these rules with respect to any class or category of persons or posts and no such relaxation shall be given so as to have retrospective effect."

15. G S. Lamba's case (1985) 3 SCR 431 : (AIR 1985 SC 1319) (supra) may be carefully considered at this stage. In that case this Court was concerned with the Indian Foreign Service which was governed by the Indian Foreign Service, Branch 'B' (Recruitment, Cadre, Seniority and Promotion) Rules, 1964. The said rules provided for recruitment to the said Service from three different sources (i) direct recruit-

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Supreme Court of India

nent by competitive examination, (ii) ubstantive appointment of persons ncluded in the select list promoted n the basis of a limited competiive examination and (iii) promotion n the basis of seniority. One of the Rules provided that the recruitment hould be made from the above sources on the following basis: (i) 6/6th f the substantive vacancies to be illed in by direct recruitment, (ii) 33⅓% f the remaining 5/6 of the vacancies o be filled on the basis of results of imited competitive examinations and iii) the remaining vacancies to be filled n by promotion on the basis of seniorty. The Court found that the direct ears, limited competitive examination ad also not been held for years and romotions from the select list had een made in excess of the quota. It ound that there was enormous departre from the rules of recruitment in naking appointments over several ears. The Court was of the view that he situation in this case was similar o the situation in two other earlier ases of this Court in A. Janarbhana's ase, (AIR 1983 SC 769) (supra) and). P. Singla, (AIR) 1984 SC 1595) supra). The Court felt that in he circumstances it should be presmed that the excess appointment by romotion had been made in relaxation f the Rules since there was power to elax the Rules similar to the power nder R 16 in the Rules with which ve are concerned here. Justifying the bove view the Court observed at ages 458-459 (of SCR)

"It was however contented that it is not permissible to infer that promotions in excess of quota were given by relaxing the quota rule because the posts in Integrated Grades II and III were within the purview of the Union Public Service Commission and the proviso to Rule 29 (a) mandates that power to relex is hedged in with a condition that it can be done after consultation with the Commission, and there is nothing to show that the Commission was ever consulted. Undoubtebly, the proviso to Rs. 29 (a) requires that the controlling authority cannot relax any of the provisions of the rules in respect of posts which are within the purview of the Union Public Service Commission unless after consultation with the Commission. It was submitted that nothing is placed on the record by the petitioners to show that power to relax the quota rule was exercised after consultation with the Union Public Service Commission. Assuming that there was no consultation, would the exercise of power to relax be vitated and and the appointments made in relaxation of the mandatory quota rule be ab initio invalid? Commencing from the decision of the Privy Council in Montreal Street Railway Co. v Normandin, AIR 1917 P. C. 142 it is well-settled that when the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty work general inconvenience or injustice to persons who have not control over those entrusted with the duty and that at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done'. The view was expressed in the context of the failure to revise list of Jurors by the Sheriff according to the revised statutes of Quebec and conviction was challenged on the ground of mistrial held by selceting Jurous from unrevised lists. The challenge failed. Coming home in State of U P. v. Manbodhan Lal Srivastava, 1958 SCR 533 a Constitution Bench of this Court specifically held that where in consultation with the Public Service Commission is provided as required by Art. 320 (3) (c) of the Constitution such provision is not mandatory and they do not confer any sights on public servants so that the absence of consultation or irregularity in consultation does not afford him a cause of action in a Court of law. There are number of subsequent decisions to which our attention was called reiterating the same principle. Therefore assuming there was failure to consult the Union Public Service Commission before exercising the power to relax the mandatory quota rule and further assuming that the posts in Integrated Grade II and II were within the purview of the Union Public Service Commission and accepting for the time being that the Commission was n consulted before the power to relax t rule was exercised yet the action take would not be vitiated nor would furnish any help to Union of Ind which itself cannot take any advanta of its failure to consult the Commissio Therefore it can be safely stated th the enormous departure from the quot rule year to year permits an inferen that the departure was in exercise the power of relaxing the quota ru conferred on the controlling authorit Once there is power to relax the mandatory quota rule, the appointments mad in excess of the quota from any give source would not be illegal or invali but would be valid and legal as hel by this Court in N.K. Chauhan v. Stat of Gujarat. (1977) 1 SCR 1037. Ther fore the promotion of the promotee was regular and legal both on accoun of the fact it was made to meet th exigencies of service in relaxation the mandatory quota rule and to subs tantive vacancies in service."

16. The Court ultimately quashe the seniority list and directed the pre paration of seniority list on the basi of length of continuous officiation i the cadre. The facts in this case bein almost identical there is no reason wh the view expressed in G.S. Lamba' case should not be adopted here also.

17. The continuance of these petitioners may be justified on the basi of the above quoted R. 16 on the assumption that the Government had relaxe the Rules and appointed them to th

posts in question to meet the administrative requirements.

18. The enormity of the prejudice that is likely to be caused to the petitioners and others who are similary situated can be demonstrated by setting out the effect of sticking to quota rule as found in R. 8(1) (a) even though there has been a deliberate deviation from it. The result of applying the quota rule would be as follows : petitionor No. 1 who was promoted to Grade IV on November 6, 1965 would be junior to a direct recruit of 1974 batch Petitioner No. 3 who was promoted to Grade IV on March 22, 1966 would become junior to a direct recruit of 1979 batch Petitioner No 6 who was promoted to Grade IV post in July 1 1966 would become junior to direct recruit of 1982 batch. Petitioner No 10 who was promoted to Grade IV on may 18, 1968 would become junior to direct recruits of 1982 batch. Petitioners Nos. 16 to 18 and 21 to 25 would continue to be treated as ad hoc appointees and will be junior to everybody appointed till now into the Service as they cannot be fitted anywhere even though they have put in 9 to 15 years of service in Grade IV. These starting results ought to shock anybody's conscience. The only just solution to this problem is to treat the petitioner as persons duly appointed to the Service with effect from the day on which they were promoted to the Grade IV posts

19 As observed in D.R. Nim v. Union of India (1967) 2 SCR 325 when an officer has worked for a long period as in this case for nearly fifteen to twenty years in a post and had never been reverted it cannot be held that the officer's continuous officiation was a mere temporary or local or stop gap arrangement even though the order of appointment may state so In such circumstances the entire period of officiation has to be counted for seniority. Any other view would be arbitrary and violative of Arts. 14 and 16 (1) of the Constitution because the temporary service in the post in question is not for a short period intended to meet some emergent or unforeseen circumstances Cl. (b) of R 9C of the Rules which deals with the question of seniority of promotees becomes irrelevant in the circumstances of this case as regards the promotees who have been holding the posts from a long time as stated above.

20. The decision in A. Janardhana's case (1983 SC 769) (supra) and the decision in O. P: Singla's case (AIR) 1984 SC 1595) (supra) strongly support the above view It is not necessary to refer to them in great detail since in G. S. Lamba's case (AIR 1985 SC 1019) (supra) the effect of the said decision is set out very clearly.

21. The decision in Karam Pal's case (AIR 1985 SC 774) (supra) is not of much assistance to the direct recruits. In that decision there was a specific finding that except for a period of two year i.e. in 1966 and 1970, direct recruitment had been made in accordance with the Scheme governing recruitment to the Central Secretariat Service

that there was substantial compliance with the rules of recruitment governing that Service. The Court observed that in the absence of serious failure in implementing the relevant rules there was no ground to interfere with the inter se seniority of the officers in the Grades concerned. Hence that decision is distinguishable of facts from the present case.

22. We are aware that the view we are taking may upset the inter se seniority between those promotees who were included in the Select Lists of 1970, 1982 and 1984 and those who were included later on or who have not been included at all till now. The existence of this possibility should not deter us from adopting a uniform rule in the case of all promotees and direct recruits to adjust the equities amongst them as regards their relative seniority in the light of the violent departure made by the Government both as regards direct recruitments and promotions which it had to make every year under the Rules. The prejudice which the promotees included in the Select Lists might suffer is marginal and has to be ignored.

23. Having given our anxious consideration to the submissions made on behalf of the parties and the peculiar facts present tn this case we feel that the appropriate order that should be passed in this case is to direct the Union Government to treat all persons who are stated to have been promoted in this case to several posts in Grade IV in each of the two Services contrary to the Rules till now as having bee
regularly appointed to the said posts i
Grade IV under R. 8 (1) (a) (ii) an
assign them seniority in the cadre wit
effect from the dates from whic
they are continuously officiating in th
said posts. Even those promotee
who have been selected in 1970, 198
and 1984 shall be assigned seniority wit
effect from the date on which the
commence to officiate continuously i
the posts prior to their selection. Fc
purposes of seniority the days c
their selection shall be ignored. Th
direct recruits shall be given seniorit
with effect from the date on whicl
their names were recommended by th
Commission for appointment to sucl
grade or post as provided in Cl. (a
of R. 9-C of the Rules A seniorit
list of all the promotees and the direc
recruits shall be prepared on the abov
basis treating the promotees as ful
members of the Service with effect fron
which they are continuously officiatin
in the posts. This direction shall b
applicable only to officers who hav
been promoted till now. This is the
meaning of the direction given by the
Court on February 1, 1984 which statec
we wish to make it clear that there is
no question of any rotation system
being applied under the Rules, as they
exist now,' All appointments shall be
made hereafter in accordance with the
Rules and the seniority of all officers
to be appointed hereafter shall be
governed by R. 9 C of the Rules.

24 We are informed that some of
the promotees and direct recruits who

are governed by this decision have been promoted to higher grades. If as a result of the preparation of the seniority list in accordance with the decision and the review of the promotions made to higher grades any of them is likely to be reverted such officer shall not be reverted. He shall be continued in the higher post which he is now holding by creating a supernumerary post, if necessary to accommodate him. His further promotion shall however be given to him when it becomes due as per the new seniority list to be prepared pursunnt to this dccision. There shall, however, be a review of all promotions made so far from Grade IV to higher posts in the light of the new seniority list. If any officer is found entitled to be so promoted to a higher grade he shall be given such promotion when he would have been promoted in accordance with the new seniority list and he shall be given all consequential financial benefits flowing therefrom. Such review of promotions shall be completed within three months and the consequential financial benefits shall be paid within three months thereafter. In giving these directions we have followed more or less the directions given we have followed more or less the directions given in P. S. Mahal v. Union of India, (AIR 1984 SC 1291) (supra)

25. We direct that above directions shall be complied with, within the period indicated above.

26 The petition is accordingly disposed of.

Order accordingly.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

Report No. 18, p. 01

P. N. Bhagwati
Judge
Supreme Court of India

OBSERVATION

Administrative order—State Govt. sanctioned, supply of crude oleo resin to three nits—It could not be said that the orders were arbitrary, mala fide and not in public nterest—No violation of Articles 14 and 19 (1) (g)—Constitution of Jummu and Kashmir, S.45.

OBSERVED BY

P.N. Bhagwati, V. D Tulzapurkar and
R. S. Pathak
Hon'ble Chief Justice and Judges Supreme Court of India.

IN

Writ Petns. Nos. 37-39 of 1979 decided on 7-3-1986 between Brij Bhushan and nother, etc, Petitioners v. State of Jammu & Kashmir and others Respondents.

TEXT

P N. Bhagwati, CJ., :— The dispute in hese writ petitions relates to the validty of three Orders, one dt 13th Oct. 978 and the others dt. 21st Oct. 1978 y which the State of Jammu & Kashnir sanctioned supply or crude oleo esin at the rate of 9,000 tonnes per nnum to respondent No. 4, 4,000 tones per annum to respondent No. 2 and ,000 tonnes per annum to respondent No. 3. All the three impugned Orders rovided for supply of oleo resin at the ate of Rs. 260/- per quintal exclusive f cost of tins, containers, sales tax etc. nd under each of the three impugned rders, there was to be a moratorium n the rate of the first 5 years and therefter the rate was liable to be increased r decreased according to the formula o be finalised between the Forest Depatment and respondent No. 2, 3 or 4 as the case may be. The validity of each of these three impugned Orders has been challenged in the present writ petitions. The grounds on which the challenge is based are, however, without substance and that is why we dismissed these writ petitions by an earlier Order made by us. The reasons for which we made the Order dismissing the writ petitions are identical with the reasons given by us while disposing of Writ Petns. Nos. 481-82 of 1979 namely, Kasturilal Reddy v. State of Jammu & Kashmir, (1980) 2 SCR 1338 : AIR 1980 SC 1992. But in order to appreciate the applicability of these reasons in the present writ petitions, it is necessary to briefly set out the circumstances in which the three impugned orders came to be passed by the State of Jammu & Kashmir.

2. There is a commodity called

oleo resin which is a forest produce extracted from certain species of trees popularly known as chir trees. The proces of extraction is called tapping. Oleo Resin is produced in only three States in the country namely, Himachal Pradesh, Uttar Pradesh and Jammu & Kashmir. It is an important raw-material for manufacture of rosin, turpentine and their derivatives. The quantity of resin extracted from Chir trees in Jammn & Kashmir was less than 6.000 tonnes in 1972-73 and its large potential had not been exploited until that time, though the States of Himachal Pradesh and Uttar Pradesh had been producing oleo resin for quite some time. In or about 1972, realising the importance of oleo resin as basic raw-material and with a view to developing industrie based on oleo resin, the Central Government appointed a Committee called Central Coordination Committee for Rosin & Turpentine inter alia to look into the need for higher production of oleo resin with improved and modern methods with a view to improving quality and out-put, diversification of products by processing industries and export of sophisticated products. Pursuant to the recommendations made by this Committee, the State of Jammu & Kashmir adopted vigorous measures for increasing the production of oleo resin and as a result of these measures, during the years 1974-75 to 1978-79 the production of oleo resin went up considerably as disclosed by the following figures :

1974-75	17.800 tonne
1975-76	33,630 ,,
1976-77	36,214 ,,
1977-78	37,536 ,,
1978-79	39,189 ,,

During this period, however, the stat of Uttar Pradesh and Himachal Prades closed down various areas for tappin in view of extensive damage caused to th chir trees by the private contractors wit the result that the production of ole resin from these two states came dow by about 40 percent The consequenc was that from 1976-77 to 1978-79 th production of oleo resin in the state c Jammu & Kashmir accounted for mor than 50 percent of the total productio of oleo resin in the country.

3 Now, in the state of Jammu & Kashmir, the tapping operations wer entrusted by the state Govt. to privat contractors since 1973 and majority c these private contractors were member of Hoshiarpur Rosin Manufacturers Association. The contracts for tappin which were given to the private contractors were of three types and the net result of giving these contracts was that ou of total production of oleo resin abou 50 percent of the quantity produced wa taken away by the private contractor and only the balance of 50 percent remained with the state Govt. The Stat Govt had its own three units in the public sector for manufacture, of rosin an turpentine which needed oleo resin out o the quantitiee remaining with the Stat Government. Out of these three units

one at sunderbani was closed while the other two units at Rajouri and Miran Saheb utilised 5,000 tonnes and 2,000 tonnes of oleo resin. The State Govt was thus left with a surplus of about 11 to 12 thousand tonnes of oleo resin after meeting the needs of its own public sector units and the State Govt. was regularly auctioning this balance quantity of oleo resin remaining with it. The large bulk of the quantity of oleo resin auctioned by the State Govt. was being purchased by members of the Hoshiarpur Rosin Manufacturers Association and, according to the State Govt what was happening was that these purchasers used to form syndicates with a view to forcing down the prices and cornering oleo resin at low prices and moreover these syndicates would not allow the entire quantity of oleo resin placed in the auction to be purchased with the result that large stocks of oleo resin remained undisposed of with the state Govt. from year to year resulting in deterioration in quality and ultimate sale at much lower prices. The average price at which oleo resin was sold by the State Govt. in auction in each of the six years preceding 1979 was as follows :

year	Avq rate per quintal
1972-72	Rs. 250.00
1973-74	No auction held
1974-75	Rs. 243.00
1975-76	Rs. 204.00
1976-77	Rs' 201.25
1977-78	Rs. 262.46

It will thus be seen that in 1978 when the three impugued Orders were passed by the State Govt. the average rate at which oleo resin was sold in auction was Rs. 262.46 and prior to that, the average rates were even lower.

4. When the State Government fonnd that a large quntity of oleo resin produced within the State was going out of the State by way of about 50% of the total production being siphoned away by the tapping cotractors and about 11 to 12 thousand tonnes by way of purchases at auction, the State Government decided to take steps to promote industries based on oleo resin available in the State so as to achieve as much value addition as possibls to the raw material by industrial conversion within the State and generate more employment opportunites. The State Government also decided to embark upon a massive programme of industrialisation in the State. With this end in view, several meetings were held by the Chief Minister in Bombay, Calcutta and Delhi with a view to persuading entrepreneurs in other States to invest in Jammu & Kashmir. But, even before these meetings were held, initiatives were taken for the purpose of setting up industries in the State and negotiations were started by the State Government with respondents Nos. 2, 3 and 4 for setting up industires based on oleo resin. The negotiations between the State Government and respondent No. 2 commenced sometime in 1972 and so far as respondent No. 4 is doncerned, the offer for setting up a factory for manufacturing rosin and turpentine derivatives was put forward by respondent No. 4 on the basis of

a tender notice issued by the State Goverment on June 2,1974. Respondent No. 3 came forward with its offer to set up a factory for manufacturing rosin and turpentine derivatives on reading the report of the speeches made by the Chief Minister at the meetings held by him in Bombay, Calcutta and Delhi. Each of respondents Nos. 2, 3 and 4 insisted in the course of the negotiations that they would be prepared to set up factories for manufacturing rosin and turpentine derivatives with the latest machinery and most sophisticated technology only if a continuous supply of oleo resin was assured to them by the State Government. The State Government with a view to promoting industrial development in the State and ensuring proper utilisation of the raw material produced within the State by industrial conversion, passed the three impugned Orders sanctioning supply of 4,000 tonnes of oleo resin per annum to each of respondents No. 2, 3 and 4 9,000 tonnes of oleo resin to the 4th respondent. It may be noted that this assured supply of oleo resin was guaranteed to respondents Nos 2, 3 and 4 not by way of sale simpliciter but only for the purpose of enabling them to run the factories which they decided to establish in the State for manufacturing rosin and turpentine derivatives. Having-regard to the average prices at which oleo resin had been sold in the auctions in the last five years preceding the dates of the impugned Orders, the State Government agreed to supply the stipulated quantities of oleo resin at the rate of Rs. 260/-per quintal, exclusive of the cost of tins, containers and sales tax, etc., which came to about Rs 296/-per quintal. Pursuant to the agreemnt arrived between the State Government and respondents Nos. 2, 3 and 4, land, electricity and other facilities were made available to respondents Nos. 2, 3 and 4 started setting up then respetive factories on the land allocated to them. The petitioners thereupon filed the present writ petitioners challenging the validity of the three impugned Orders assuring supply of 4,000, 4000, and 9,000, tonnes of oleo resin to respondent Nos. 2, 3 and 4 respectively at the rate of Rs. 260/-per quintal exclusive of the cost of tins, containers, sales tax etc.

5. The first ground of attack against the validity of the three impugned Orders was that they created monopoly in favour of respondents Nos. 2, 3 and 4 and constituted reasonable restriction on the right of the petitioners to carry on business of manufacture of rosin and turpentine derivatives under Art. 19(1) (g) of the Constitution. We do not think there is any substance in this ground and it must be rejected. It is difficult to see how it can at all be contended that any monopoly was created in favour of respndents Nos. 2, 3 and 4 by the State Government by making the three impugned Orders. The annual production of oleo resin in the State was in the neighbourhood of about 36,000 tonnes and out of them only 17,000 tonnes per annum were given to respondents Nos. 2,3 and 4 & about7,000

onnes were reserved for the units in the ublic sector, leaving as much as 12,000 onnes of oleo resin available for the ther manufacturers. The petitioners nd other manufacturers did therefore, ave about 12,000 tonnes of oleo resin vailable for them. In the circumstanes, no monopoly in regard to oleo resin ould possible be said to have been creaed by the State Government in favour f respondents Nos. 2, 3, and 4. Morever, it may be noted that what the State Government did under the three impuged Orders was not sale simpliciter of leo resin but assured supply of oleo esin was guaranteed to respondents Nos. 2 to 4 for the purpose of feeding he factories to be set up by them in the tate. This ground of attack against he validity of the three impugned Orders must, therefore, be rejected.

6. The other ground urged on ehalf of the petitioners against the valiity of the three impugned Orders was hat they were arbitrary, malafide and ot in public interest in as much as a huge avour was conferred on respondents Nos. 2, 3 and 4 at the cost of the State. This ground is also without substance nd cannot be substained. There are two ogent reasons why this ground cannot e accepted. The first reason is that hen the negotiations took place beteen the parties and the three impugned Orders were issued by the State Goverment, the average price at which oleo esin had been sold in action during the ve preceding years was not more than Rs, 260/-per quintal and the State Govrnment was, therefore, not unjustified in fixing the price of oleo resin to be supplied to respondents Nos. 2, 3 and 4 at Rs. 360/-per quintal exclusive of the cost of tins, containers, sales tax, etc. It is true that at about this time the market price of oleo resin started rising and subsequent to the making of the three impugned Orders there was an abnormal rise in the mrket price, but that was obviously because by this time it had become known that the State Government had taken a policy decision not to allow the export of oleo resin from its territories but to given it only for industries set up within the State and scarcity price accordingly prevailed in the market. Secondly, there could be no question of the State Government trying to secure the highest price from respondents Nos 2, 3 and 4 since the sale of oleo resin to them under the three impugned Orders was not a sale simpliciter but it was a sale for the purpose of feeding the factories to be set up by them. We may usefully quote here what we said in our judgment in Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir (AIR 1980 SC 1992) supra; while dealing with a similar argument advanced in that case :

"This argument, plausible though it may seem, is fallacious because if does not take into account the policy of the State not take into account the policy of the State not to allow export of resin outside its territories but to allot it only for use in factories set up within the State. It is obvious that, in view of this policy. no resin would be auctioned by the State and there would be no question of sale of resin the open market and in this situation it would be totally irrelevant to import the concept of market price with reference to which the adequacy of the price charged by the state to the 2nd respondents could be judged. If the State were simply selling resin, there can be no doubt that the State must endeavour to obtain the highest price subject, of course, to any other overriding considerations of public interest and in that event, its action in giving resin to a private individual at a lesser price would be arbitrary and contrary to public interest. But, where the State has, as a matter of policy, stopped selling resin to outsiders and decided on allot it only to industries set up within the State for the purpose of encouraging industrialisation, there can be no scope for complaint that the State is giving resin at a lesser price than that which could be obtained in the open market. The yardstick of price in the open market would be wholly inept, because in view of the State policy, there would be no question of any resin being sold in the open market, the object of the State in such case is not to earn revenue from sale of resin but to promote the setting up of industries within the State".

This ground must also, therefore, be rejected.

7. Then, it was contended on behalf of the petitioners that the State Government had acted arbitrarily in selecting respondents Nos. 2, 3 and 4 for setting up factories within the State for manufacture of rosin and turpentine derivatives without affording any opportunity to the petitioners and others for obtaining such contract and this action of the State Government was not based on any rational or relevant principles and was, therefore violative of Act 14 of the Constitution. We must reject this ground also without the slightest hesitation. Respondents Nos. 2, 3 and 4 themselves took the initiative and made offers for setting up factories for manufacture of rosin and turpentine derivatives provided they were assured definite supply of oleo resin every year and ultimately, as a result of negotiation which took place between them and the State Government, they were given licence for setting up their factories and assured supply of oleo resin was guaranteed to them for the purpose of feeding their factories. There was nothing to prevent the petitioners and others from making similar offers in time. But, in any event, even if the petitioners and others had made offers, it was for the State Government to decide whether their offers shoud be accepted or not. It is true that no advertisements were issued by the State Government inviting tenders for setting up factories for monufacture of rosin and turpentine derivatives or stating that assured supply of oleo resin would be guaranteed to any party who is prepared to put up a factory for manufacture of rosin and turpentine derivatives within the State. But, that cannot have any invalidating effect on the decision of the State Government to allow respondents Nos. 2, 3 and 4 to set up factories and to guarantee assured supply

of oleo resin to them for feeding their factories. We may point out that a similar argument was advanced on behalf of the petitioners in Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir, (AIR 1980 SC 1992) (supra) where a tapping contract was given to respondent No. 2 in that case and what we said in our judgment in that case applies with equal force to the situation in the present case:

"...... but it must be remembered that it was not a tapping cantract simpliciter which was being given by the State. The tapping contract was being given by way of allocation of raw material for feeding the factory to be set up by the 2nd respoudents. The predominant purpose of the transaction was to ensure setting up of a factory by the 2nd respondents as part of process of industrialisation of the State and since the 2nd respondents wanted assurance of a definite supply of resin as a condition of putting up the factory, the State awarded the tapping contract to the 2nd respondents for that purposes. If the State were giving tapping contract simpliciter there can be no doubt that the State would have to auction or invited tenders for securing the highest price, subject, of course, to any other relevant overriding considerations of public weal or interest, but in a case like this where state is allocating resources such as water, power, raw materials etc. for the purpose of encouraging setting up of industries within the State, we do not think the state is bound to advertise and tell the people that it wants a particular industry to be set up with the State and invited those interested to come up with proposals for the purpose. The State may choose to do so if it thinks fit and in a given situation it may even turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to set up an industry, the State would not be committing breach of any constitutional or legal obligation if it negotiates with such party and agrees to provide resources and other facilities for the purpose of setting up the industry. The State is not obliged to tell such party; "please wait, I will first advertise, see whether any other offers are forthcoming and then after considering all offers, decide whether I hsould let you set up the industry". It would be most unrealistic to insist on such a procedure, particularly in an area like Jammu and Kashmir which on account of historical, political and other reasons, is not yet industrially developed and where entrepreneurs have to be offered attractive terms in order to persuade them to set up an industry. The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to set up an industry within the State and if the State enters into a contract with such entrepreneurs for providing resources and other facilities for setting up an industry the-contract cannot be assailed as invalid so long as the State had acted bona fide, reasonably and in public interest."

Here in the present case there is

nothing at all to show that the State acted mala fide or out of improper or corrupt motive or in order to promote the private interest of someone at the cost of the State. We are clearly of the view that the three impugned orders do not suffer from any infirmity and they cannot be assailed as invalid.

8. These are reasons for which we dismissed the present writ petitions.

Petitions dismissed.

D. P. Madon
Judge
Supreme Court of India

OBSERVATION

Constituion of India, Art. 311 (2) Second Proviso Cl. (b)—Central Civil Ser- ices (Classification, Control and Appeal) Rules (1965), R. 19—Dispensation of enq- iry under Cl. (b)—Satisfaction of authority that is not reasonably practicable to old such inquiry Disturbance created by employees of Research and Analysis Wing f Govt.—Opinion of Disciplinary Authority that material witnesses would not be vailable due to intimidation—Dismissal of employees after dispensing with inqniry -Held, dispensation was valid.

OBSERVED BY

V. D. Tulzapurkar; R. S. Pathak
And D. P. Madon

Hon'ble Judges Supreme Court of India

IN

Civil Appeals Nos 242 and 576 of 1982, decided on 12-9-1985 between Sat- avir Singh and others, Appellants v. Union of India and others, Respondents.

And

Between D. P. Vohra, Appellant v. Union of India and others, Respondents.

TEXT

Madon, J. :—The appellants who ere employed in the Research and An- ysis wing, Cabinet Secretariat, Gover- ement of India were dismissed from ervice in the exercise of the power con- erred by clause (b) of the second pro- so to Art. 311 (2) of Constitution India read with Rule 19 of the Cen- al Civil Services (Classification, Con- ol and Appeal) Rules, 1965, without erving any charge-sheet upon them and ithout holding any inquiry. The appe- ants thereupon filed in the Delhi High ourt a writ petition under Article 226 the Constitution challenging the said ders of dismissal. The said writ petition was dismissed by a Division Bench of the Delhi High Court by its judgment and order dated September 25, 1981: (1982 Lab IC 663). It is against the said jugment and order of the Delhi High Court that the present two Appels have been filed by Special Leave granted by this Court under. Article 311 of the Constitution :

2. Prior to the amendment of the second clause of Art. 311 of the Constitution by the Constitution (Forty-second Amendment) Act, 1976, with effect from January 3, 1977, the second proviso to the said clause was the only

proviso to the said clause (2). Art. 311 as amended by the Constitution (Fifteenth Amendment) Act, 1963, and the Constitution (Forty-second Amendment) Art, 1976, reads as follows :

"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State,-

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges :

Provided that where it is proposed after such inquiry, to impose upon him may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed :

Provided further that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person o
to reduce him in rank is satisfied tha
for some reason, to be recorded by tha
authority in writing, it is not reasonabl
practicable to hold such inquiry; or

(c) where the President or th
Governor, as the case may be, is satisfied that in the interest of the security o
the State it is not expedient to hold suc
inquiry.

(3) If, in respect of any suc
person as aforesaid, a question arise
whether it is reasonably practicable t
hold such inquiry as is referred to i
clause (2), the decision thereon of th
authority empowered to dismiss o
remove such person or to reduce him i
rank shall be final."

Rule 19 of the Central Civil Service
(Clssification, Cotrol and Appeal
Rules 1965.

3. The Central Civil Services (Classification, Control and Appeal) Rules, 1965, have been made by the President in exercise of the power conferred by the proviso to Art. 309 of the Costitution, Rule 19 of the said Rules is in substance the same as the second proviso to Article 311 (2) and provides as follows :

"19. Special procedure in certain cases.—Notwithstanding anything contained in Rule 14 to Rule 18.—

(i) where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, or

(ii) where the disciniary authord

ty is satisfied for reasons to be recorded oy it in writing that it is not reasonably oracticable to hold an inquiry in the nanner provided in these rules, or

(iii) where the President is satisied that in the interest of the security of the State, it is not expedient to hoid ıny inquiry in the manner provided in hese rules.

the disciplinary authority may consder the circumstances of the case and nake such orders thereon as it deems it :

Provided that the Commission shall oe consulted, where such consultation s necessary, before any orders are made n any case under this rule."

The word "Commission" is defined oy clause (b) of Rules 2 meaning "the Jnion Public Service Commission."

The Decision in Tulsiram Patel's Case.

4. It was not disputed at the hearing of these two appeals that they fall to oe decided in the light of what was held n Union of India v. Tulsiram Patel and other connected matters, (1985) 3 SCC 398. By the decision in Tulsiram Patel's case large number of writ petition either filed in this Court or in various High Courts and transferred to this Court and several Appeals by Special Leave, all involving the interpretation of Arts. 309, 310 and 311 of the Constitution and in particular of the second proviso of Art 311 (2), were disposed of by a five-Judge Constitution Bench of this Court, with one learned Judge-dissenting except as regards the enterpretation to be placed upon clause (c) of the second proviso to Art. 311 (2).

5. A large number of points fell for decision in Tulsiram Patel's case. It will, therefore, be convenient first to summarize topic-wise the conclusion reached by the majority in that case and then to emphasize the important rights conferred by the majority judgment upon persons who are members of a civil service of the Union of India or an All-India Service or a civil service of a State or hold a civil post under the Union of India or a State in other words, upon civil servants and thereafter to deal with the facts of the present. Appeals and the contention raised at the hearing thereof.

6. The conclusions reached by the majority in Tulsiram Patel's case were

I. The Pleasure Doctrine in the United Kingdom.

(1) The pleasure doctrine relates to the tenure of a government servant, that is, his right to continue to hold office. Under it all public officers and servants of the Crown in the United Kingdom hold their appointments at the pleasure of the Crown and their services can be terminated at will without assigning any cause.

(2) The pleasure is not based upon any special prerogative of the Crown but is based on public policy and is in public interest and for public good. The basis of the pleasure doctrine is that the public is vitally interested in the efficiency and integrity of civil servtces and, therefore, public policy requires

public interest needs and public good demands that civil servants who are inefficient, dishonest or corrupt or have become a security risk should not continue in service.

(3) In the United Kingdom, Parliament is sovereign and can make any law whatever and the courts have no power to declare it void. In the United Kingdom, therefore, the pleasure doctrine is subject to what may be expressly provided otherwise by legislation.

II. The Pleasure Doctrine in India

(4) In India the pleasure doctrine has received constitutional sanction by being enacted in Article 310 (1) of the Constitution of India. Under Art. 310 (1), except as expressly provided in the Constitution, every person who is a member of a defence service or a civil service of the Union of India or of an all-India service or holds any post connected with defence or any civil post under the Union of India holds office during the pleasure of the President and every person who is a member of a civil service of a State or holds any civil post under a State holds during the pleasure of the Governor of the State.

(5) Thus, unlike in the United kingdom, in India the pleasure doctrine is not subject to any law made by Parliament or a State Legislature but is subject to only what is expressly provided in the Constitution. In India, therefore, the exceptions to the pleasure doctrine can only be those which are expressly provided in the Constitution.

(6) There are several exceptions to the pleasure doctrine expressly provided in the Constitution.

(7) Article 311, being an express provision of the Constitution, is an exception to the pleasure doctrine contained in Art. 310 (1) of the Constitution, Cls. (1) and (2) of Article 311 restrict the operation of the pleaure doctrine so far as civil servants are concerned by conferring upon civil servants the safeguards provided in those clauses.

(8) Under clause (1) of Article 311 no civil servant can be dismissed or removed from service by an authority subordinate to that by which he was appointed.

(9) Under clause (2) of Article 311 no civil servant can be dismissed or removed from service or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges, by reason of the amendment made by the Constitution. (Forty-second Amendment) Act, 1976, in clause (2) of Art. 311 it is now not necessary to give to a civil servant an opportunity of making a repesentation with respect to the penalty proposed to be imposed upon him.

(10) An order of compulsory retirement from service imposed upon a civil servant by way of penalty amounts to "removal" from service and attracts the provisions of Article 311.

(11) Restrictions on the operation of the pleasure doctrine contained in legislation made by Parliam

ent in the United Kingdom and in clauses (1) and (2) of Article 311 in India are also based on public policy and are in public interest and for pub-ic good inasmuch as they give to civil ervants a feeling of security of tenure.

(12) The safeguard provided to ivil servants by clause (2) of Article 311 is taken away when any of the three clauses of the second proviso (originally he only proviso) to Article 311 (2) becomes applicable.

(13) It is incorrect to say that he pleasure doctrine is a prerogative of the British Crown which has been nherited by India and transposed into ts Constitution, adopted to suit the onstitutional set up of the Republic of ndia. Authorative judicial dicta both n England and in India, for, instance, Shenton v. Smith, 1895 Ac 229 Dunn v. The Queen, (1896) 1 QB 116, 119-120; S C (1895-96) 73 LT 695 and sub nomne Dunn v. Regem in (1895-1899) All ER Rep 907, State of Uttar Pradesh v. Babu Ram Upadhya, (1921) 2SCR 679, 96, Moti Ram Deka v. General Manaer N.E F. Railways, Maligaon Pandu, 1964) 5 SCR 683, 734-5 and Roshan Lal Tandon v. Union of India, (1968) SCR 185, 195 : (AIR 1967 SC 1889, ave laid down that the pleasure loctrine and the protection afforded o civil servants by legislation in the United Kingdom and by Cls (1) and 2) of Article 311 in India are based on ublic policy and are in public interest nd for public good. Similarly, the withlrawal of the safeguard contained in lause (2) of Article 311 by the second proviso to the clause is also based on public policy and is in public interest and for public good.

(14) Neither Article 309 nor Art. 310 nor Article 311 sets out the grounds for dismissal removal or reduction in rank or for imposition of any other penalty upon a civil servant. These Articles also do not specify what the other penalties are. These matters are left to be dealt with by rules made under the proviso to Article 309 or by Acts referable to that Article or rules made under such Acts.

(15: The pleasure of the President or the Governor is not to be exercised by him personally. It is to be exercised by the appropriate authority specified in rules made under the proviso to Article 309 or by Acts referable to that Article or rules made under such Acts. Where, however, the President or the Governor, as the case may be, exercises his pleasure under Article 310 (1), it is not required that such act of exercise of the pleasure under Article 310 (1) must be an act of the President or the Governor himself but it must be an act of the President or the Governor in the Constitutional sense, that is, with the aid and on the advice of the Council of Ministers.

III. The Inquiry under Article 311 (2)

(16) Clause (2) of Article 311 gives a constitutional mandate to the principles of natural justice and the audi alteram partem rule by providing that a civil servant shall not be dismissed or

removed from service or reduced in rank until after an inquiry in which he has been informed of the charges against him and has been given a reasonable opportunity of being heard in respect of those charges.

(17) The nature of this inquiry has been elaborately set out by this Court in Khem Chand v. Union of India, 1958 SCR 1080, 1095-97 and even after the Constiution (Forty-second Amendment Act, 1976, the inquiry required by clause (2) of Article 311 would be the same except that it would not be necessary to give to a civil servant an opportunity to make a representation with respect to the penalty proposed to be imposed upon him.

(18) As held in Suresh Koshy George v. University of Kerala (1969) 1 SCR 317, 326-7 and Associated Cement Companies Ltd. v. T.C. Srivastava, (1984) 3 SCR 361, 369, apart from Article 311 prior to its amendment by the Constitution (Forty-second Amendment) Act, 1976, it is not necessary either under the ordinary law of the land or under industrial law to give a second opportunity to show cause against the penalty proposed to be imposed upon an employee.

(19) If an inquiry held against a civil servant under Art. 311 (2) is unfair or biased or has been conducted in such a manner as not to give him a fair or reasonale opportunity to defend himself, the principles of natural justice would be violated; but in such a case the order of dismissal, removal or reduction in rank would be bac as contravening the express provisions of Art. 311 (2) and there is n scope for having recourse to Art 14 fo the purpose of invalidating it.

IV. The Second Proviso to Art 311 (2)

(20) The language of the secon proviso to Art. 311 (2) is plain an unambiguous. The key words in th second proviso are "this clause shal not apply". There is no ambiguity i these words. Where, therefore, a situation envisaged in any of the thre clauses of the second proviso arises, th safeguard provided to a civil servan by Cl : (2) Art. 311 is taken away.

(21) The second proviso to Art 311 (2) becomes applicable in the thre cases mentioned in Cls. (a) to (c) o that proviso, namely,

(a) where a person is dismisse or removed or reduced in rank o the ground of conduct which has led to his conviction on a crimina charge;

(b) where the authority empowered to dismiss or remove a person o to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing it is not reasonably practicable to hold such inquiry; and

(c) where the President or the Governor as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(22) The governing words of the econd proviso to Cl. (2) of Art. 311. amely, ' this clause shall not apply", re mandatory and not directory and are n the nature of a constitntional proh-itory injunction restraining the discip-inary authority from holding an inqu-ry under Art. 311 (2) or from giving ny kind of opportunity to the conce-ned civil servant in a case where one f the three clauses of the second pro-iso becomes applicable. There is thus o scope for introducing into the second roviso some kind of inquiry or opp-rtunity to show cause by a process f inference or implication. The maxim 'expression facit cessare tacitum" "when there is express mention of ertain things, then anything not men-ioned is excluded") applies to the case. his well known maxim is a principle f logic and common sense and not nerely a technical rule of construction s pointed out in B. Shankara Rao Bad-mi v. State of Mysore, (1969) 3 SCR ., 12.

(23) The second proviso to Art. 11 (2) has been in the Constitution of ndia since the time the Constitution vas originally enacted. It was not lindly or slavishly copied from S. 240 3) of the Government of India Act, 935. There was a considerable debate n this proviso in the Constituent Asembly as shown by Official Report of he Constituent Assembly Debates vol. X, pages 1099 to 1116. The majority f the members of the Constituent Asembly had fought for freedom and had suffered imprisonment in the cause of liberty and were, therefore, not likely to introduce into our Constitution any provision from the earlier Government of India Acts which had been enacted purely for the benefit of a foerign smperialistic power. They retained the second proviso as a matter of public policy and as being in the public interest and for public good. They further enserted Cl. (c) in the second priviso dispensing with the inquiry under Art. 311(2) in a case where the President or the Governor as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry as also added a new clause, namely, Cl. (3), sn Art 311 giviving finality to the decision of the disciplinary authority that it is not reasonably practicable to hold the inquiry under Art. 311 (2), S. 240 of the Government of India Act, 1935, did not contain any provision similar to Cl. (c) of the second proviso to Art. 311(2) or Cl. (3) of Art. 311.

V. Article 14 and the Second Proviso.

(4) The principles of natural justice are not the creation of Article 14 of the Constitution Art. 14 is not the begetter of the principles of natural justice but is their constitututional guardian.

(25) The principles of natural justice consist primarily of two main rules, namely, "nemo judex in causa sua" ("no man shall be a judge in his own case") and "audi alteram partem" ("hear the other side"). The corollary deduced

from the above two rules and particularly the audi alteram partem rule was "qui aliquid statuerit parte inaudita altera, aequum licet dixerit haud aequus fuerit" ("he who shall decide anything without the other side having been heard although he may have said what is right will not have done what is right" or as is now expressed "justice" should not only be done but should manifestly be seen to be done"). These two rules and their corollary are neithor new nor were they the discovery of English judges but were recognized in many civilizations and over many centuries.

(26) Article 14 applies not only to discriminatory class legislation but also to arbitrary or discriminatory State action Violation of a rule of natural justice results in arbitrariness which is the same as discrimination, and where discriminaiton is the result of a State action, it is a violation of Art. 14. Therefore, a violation of a principle of natural Justice by a State action is a violation of Art. 14.

(27) The principles of natural justice apply both to quasi-judicial as well as administrative inquiries entailing civil consequences.

(28) It is well established both in England and in India that the principles of natural justice yield to and change with the exigencies of different situation and do not apply in the same manner to situations which are not alike. They are neither cast in a rigid mould nor can they be put in a legal strait jacket. They are not immutable but flexible and can be adopted, modified or excluded by statuter and statutor rules as also by the constitutio of the tribunal which has to decid a particular matter and the rules b which such tribunal is governed. Instances of cases in which it has been s held are Norwest Holst Ltd. v. Secretary of State for Trade, (1978) 1 Ch 201, 227, Suresh koshy George v University of Kerala, (1969) 1 SCR 317 322, A. K. Kraipak v. Union of India (1970) 1 SCR 457, 469, Union of Indi v Col J. N. Sinha, (1971) 1 SCR 79 (794-95), Swadeshi Cotton Mills v Union of India, (1981) 2 SCR 533,591 J. Mohapatra and Co. v. State o Orissa, (1985) 1 SCR 322, 334-5 and Maneka Gandhi v. Union of India, (1978) 2 SCR 621 681.

(29) If legislation and the necessities of a situation can exclude the principles of natural justice including the audi alteram rule, a fortiori so can a provision of the Constitution such as the second proviso to Art 311 (2).

(33) The audi alteram partem rule having been excluded by a constitutional provision, namely, the second proviso to Art. 311 (2) there is no scope for reintroducing it by a side-door to provide once again the same inquiry which the constitutional provision has expressly prohibited.

(31) A right of marking a representation after an action is taken against a person has been held by this Court in Maneka Gandhi's case and in Liberty Oil Mills v. Union of India, (1984) 3 SCC 465 to be a sufficient compliance with the requirements of natural justice. In

he case of a civil servant to whom the rovisions of the second proviso to Art. 11 (2) have been applied, he has the right of a departmental appeal in which e can show that the charges made against him are not true and an appeal is a vider and more effective remedy than a ight of making a representation.

(32) The majority view in A. K. Gopalan v. State of Madras, 1950 SCR 8, namely, that particular Articles gov-rning certain Fundamental Rights oper-te exclusively without having any inter-elation with any other Article in the Chapter on Fundamental Rights was isapproved and held to be not correct n Rustom Cawasji Cooper v. Union of ndia, (1970) 3 SCR 530 The position hat the majority view in Gopalan's case was overruled in R C Cooper's case was reiterated in Sambhu Nath Sarkar . State of West Bengal, (1974) 1, Hard-an Saha v. State of West Bengal, (1975) SCR 778, Khudiram Das v. State of West Bengal, (1975) 2 SCR 832 and Ma-eka Gandhi's case. Thus, the majority iew in Gopalan's case was buried in R. . Cooper's case; its burial service was ead in Sambhu Nath Sarkar v. State of West Bengal, Haradhan Saha v. State of West Bengal and Khuditam Das v. State f West Bengal and its funeral oration as delivered in Maneka Gandhi's case; nd it is to be hoped that the ghost of hat majority view does not at some fu-ure time rise from its grave and stand, anking its chains, seeking to block the nward march of our country to prog-ss, prosperity and the establishment of Welfare State.

(33) The decisions in R C. Cooper's case and the other cases which followed it do not, however, apply where a Fundamental Right, including the audi alteram partem rule comprehended within the guarantee of Art. 14, is excluded by the Constitution itself. Instances of such express exclusionary provisions contained in the Constitution are Art. 31A(1) Art. 31B, Art. 31C, Art 22(5), and the second proviso to Art. 311(2) as regards the audi alteram partem rule, namely, affording an opportunity of a hearing to a civil servant before imposing the penalty of dismissal, removal or reduction in rank upon him.

(34) The principles of natural justice must be confined within their proper limits and not allowed to run wild. The concept of natural justice is a magnificent thoroughbred on which this nation gallops forwards towards its proclaimed and destined goal of "Justice, social, economic and political". This thoroughbred must not be allowed to turn into a wild and unruly horse, careering off-where it lists, unsaddling its rider and bursting into fields where the sign" no pasaran" is put up.

VI. Service Rules and Acts.

(35) Art, 309 is expressly made subject to the provisions of the Constitution. Rules made under the proviso to Art. 309, Acts referable to that Article, and rules made under such Acts are, therefore, subject both to Art. 310 (1) as also to Art. 311. If any such rule or Act impinges upon or restricts the operation of the pleasure doctrine embodied in Art. 310 (1) except as expressly pro-

vided in the Constitution or restricts or takes away the safeguards provided to civil servants by Cls. (1) and (2) of Art. 311, it would be void and unconstitutional as contravening the provisions of Art 310(1) or Cl. (1) or Cl. (2) of Art. 311 as the case may be. Any such Act or rule which provides for dismissal, removal or reduction in rank of a civil servant with out holding an inquiry as contemplated by Cl. (2) of Art. 311 except in the three cases specified in the second proviso to that clause would, therefore, be unconstitutional and void as contravening Art. 311 (2).

(36) In the same way, for an Act or a rule to provide that in a case where the second proviso to Art. 311 (2) applies, any of the safeguards excluded by that proviso will be available to a civil servant would be void and unconstitutional as impinging upon the pleasure of the President or the Governor, as the case may be.

(37) A well-settled rule of construction of statutes is that where two interpretations are possible, one of which would preserve and save the constitutionality of the particular statutory provision while the other would render it unconstitutional and void, the one which saves and preserves its constitutionality should be adopted and the other rejected.

(38) Where an Act or a rule provides that in a case in which the second proviso to Art. 311 (2) applies any of the safeguards excluded by that proviso will be abailable to a civil servant, the constitutionality of such provision would be preserved by interpreting it as bei directory and not mandatory. The bre of such directory provision woul not, however, furnish any cause of actio or ground of challenge to a civil serva because at the threshold such cause action or ground of challenge would barred by the second proviso to Ar 311 (2).

(39) Service rules may reprodu the provisions of the second proviso t Art. 311 (2) and authorize the di ciplinary authority to dispense wi the inquiry as contemplated by C (2) of Art. 311 in the three cas mentioned in the second provi to that clause or any one or more them. Such a provision, however, not valid and constitutional without re erence to the second proviso to Art. 31 (2)and cannot to read aprat from Thus, while the source of authority a particular officer to act as a discipli ary authority and dispense with the i quiry is derived from the service rule the source of his power to dispense wit inquiry is derived from the second pr viso to Art. 311 (2) and not from ar service rule.

(40) The omission to mention i an order of dismissal removal or reduc ion in rank the relevant clause of th second proviso or the relevant servic rule will not have the effect of invalidating the order imposing such penalt and the order must be read as havin been made under the applicable claus of the second proviso to Art. 311 (2 read with the relevant service rule.

(41) Rule 37 of the Central Industrial Security Force Rules, 1969, is clumsily worded and makes little sense. To provide that a member of the Central Industrial Security Force who has been convicted to rigorous imprisonment on a criminal charge "shall be dismissed from service" and at the same time to provide that "only a notice shall be given to the party charged proposing the penalty of dismissal for his having been convicted to rigorous imprisonment and asking him to explain as to why the proposed penalty of dismissal should not be imposed" is a contradiction in terms. To read these provisions as mandatory would to be render them unconstitutional and void. These provisions must, therefore, be read as directory in order to preserve their constitutionality.

(42) Rule 19 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, is identical with R. 14 of the Railway Servants (Discipline and Appeal) Rules, 1968, and the interpretation of the said Rule 19 would be the same as that of the said Rule 14.

VI. challalappan's case

(43) The three-Judge Bench of this Court in Divisional Personnel Officer, Southern Railway v. T. R Challappan. (1976) 1 SCR 783 : (AIR 1975 SC 2216) was in error in interpreting Rules 14 of the Railway Serbants (Discipline and Appeal) Rules, 1968, by itself and not in conjunction with second proviso to Art. 311 (2).

(44) The Court in Challappans case also erred in holding that the addition of the words "the disciplinary authority may consider the circumstances of the case and make such order thereon as it deems fit" in the said Rule 14 warranted an interpretation of the said Rule different from that to be placed upon the second proviso to Art. 311 (2).

(45) The Court in Challappan's case also erred in the interpretation placed by it upon the word "consider" occurring in the above phrase in the said Rule 14. The view taken by the Court in that case that a consideration of the circumstanees of the case cannot be unilateral but must be after hearing the delinquent civil servant would render this part of the said Rule 14 unconstitutional as restricting the full exclusion-any operation of the second proviso to Art. 311 (2).

(46) The word "consider" in its ordinary and natural sense is not capable of the meaning assigned to it in Challappan's case.

(47) The consideration of the circumstances under the said Rule 14 must, therefore, be ex parte and without affording to the concerned civil servant an opportunity of being heard.

(41) The decision in Challappan's case never held the field for the judgment in that case was delivered on September 15, 1975, it was reported in (1976) 1 SCR 783 : (AIR 1975 SC 2216) and hardly was that case reported, than in the next group of appeals in which the same question was raised the matter was referred to a larger Bench by an order made

on November 18, 1976, in view of the earlier decision of another three-Judge Bench in M. Gopala Krishna Naidu v. State of Madhya Pradesh, (1968) 1 SCR 355 : (AIR 1968 SC 240). The correctness of Challappan's case was, therefore, doubted from the very beginning.

VIII. Executive Instructions

(49) Executive Instructions stand on a lower footing than a statutory rule. Executive instructions which provide that in a case where the second proviso to Art. 311 (2) applies, any safeguard excluded by that proviso would be available to a civil servant would only be directory and not mandatory.

IX. The Scope of the Second proviso.

(50) The three clauses of the second proviso to Art 311 are not intended to be applied in normal and ordinary situations. The second proviso is an exception the normal rule and before any of the three clauses of that proviso is applied to the case of a civil servant, the conditions laid down in that clause must be satisfied.

(51) Where a situation envisaged in one of the clauses of the second proviso to Art. 311 (2) exists, it is mandatory that the punishment of dismissal, removal or reduction in rank should be imposed upon a civil servant The disciplinary authority will first have to decide what punishment is warranted by the facts and circumstances of the case Such consdieration would, however be ex parte and without hearing the concerned civil servant. If the disciplinary authority comes to the conclusion that the punishment which is called for is that of dismissal, removal or reduction in rank, it must dispence with the inquiry and then decide for itself which of the aforesaid three penalties should be imposed.

X. Clause (a) of the Second proviso.

(52) In a case where Cl. (a) of the second proviso to Art 311 (2) applies the disciplinary authority is to take the conviction of the concerned civil servant as sufficient proof of misconduct on his part. It has thereafter to decide whether the conduct which had led to the civil servant's conviction on a criminal charge was such as to warrant the imposition of a penalty and if so, what that penalty should be For this purpose it must peruse the judgment of the criminal Court and take into consideration all the facts and circumstances of the case and the various factors set out in challappan's case, such as, the entire conduct of the civil servant, the gravity of the offence committed by him, the impact which his misconduct is likely to have on the administration, whether the offence for which he was convicted was of a technical or trivial nature, and the extenuating circumstances, if any, present in the case. This however, has to be done by the disciplinary authority ex parte and without hearing the concerned civil servant.

(53) The penalty imposed upon

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e civil servant should not be arbitrary grossly excessive or out of all pro- ortion to the offence committed or ne not warranted by the facts and rcumstances of the case.

(54) Where a civil servant goes the office of his superior officer whom e believes to be responsible for stopping is increment and hits him on the head ith an iron rod, so that the superior ficer falls down with a bleeding head, nd the delinquent civil servant is ied and convicted under S. 332 of e Indian Penal Code but the Magis- ate, instead of sentencing him imprisonment, applies to him ne provisions of S. 4 of the Prob- ion of Offenders Act, 1958, and after ch conviction the disciplinary autho- ty, taking the above facts into onsideration, by way of punishment ompulsorily retires the delinquent vil servant under Cl. (i) of S. 19 of ne Central Civil Services (Classifica- on, Control and Appeal) Rules 1965, cannot be said that the punishment flicted upon the civil servant was xcessive or arbitrary.

XI. Clause (d) of the Second Pro- so.

(45) There are two conditions recedent which must be satisfied before 1 (b) of the second proviso to Art. 11 (2) can be applied. These conditi- ns are :

(i) there must exist a situation hich makes the holding of an inquiry ontemplated by Art. 311 (2) not easonably practicable, and

(ii) the disciplinary authority should record in writing its reason for its satisfaction that it is not reasonably practicable to hold such inquiry.

(56) Whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so.

(57) It is not a total or absolute impracticability which is required by Cl. (b) of the second proviso. What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.

(58) The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority and must be judged in the light of the circumstances then prevailing. The disciplinary authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of the prevailing situation that Cl. (3) of Art. 311 makes the decision of the disciplinary authority on this question final

(59) It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry. Illustrative cases would be......

(a) Where a civil servant, particularly through or together with his associates, so terrorizes, threatens or intimidates witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so, or

(b) where the civil servant by himself or together with or through other threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held, or

(c) where an atmosphere of violence or of general indiscipline and insubordination prevails, it being immaterial whether the concerned civil servant is or is not a party to bringing about, such a situation. In all these cases, it must be remembered that numbers coerce and terrify while an individual may not.

(60) The disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the civil servant is weak and must fail.

(61) The word "inquiry" in Cl. (b) of the second proviso includes a part of an inquiry. It is, therefore, not necessary that the situation which makes the holding of an inquiry not reasonably practicable should exist before the inquiry is instituted against the civil servant. Such a situation can also come into existence subsequently during the course of the inquiry, for instance, after the service of a charge-sheet upon the civil servant or after he has filed his written statement thereto or even after evidence has been led in part.

(62) It will also not be reasonably practicable to afford to the civil servant an opportunity of a hearing or further hearing, as the case may be, when at the commencement of the inquiry or pending it, the civil servant absconds and cannot be served or will not participate in the inquiry. In such cases, the matter must proceed ex parte and on the materials before the disciplinary authority.

(63) The recording of the reason for dispensing with the inquiry is a condition precedent to the application of Cl. (b) of the second proviso. This is a constitutional obligation and if such reason is not recorded in writing the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional. It is, however, not necessary that the reason should find a place in the final order but it would be advisable to record it in the final order in order to avoid an allegation that the reason was not recorded in writing before passing the final order but was subsequently fabricated.

(64) The reason for dispensing wih the inquiry need not contain detailed particulars but it cannot be vague or just a repetition of the language of Cl. (b) of the second proviso.

(65) It is also not necessary to communicate the reason for dispensing with the inquiry to the concerned civil servant but it would be better to do so in order to eliminate the possibility of an allegating being made that the reason was subsequently fabricated.

(66) The obligation to record the reason in writing is provided in Cl. (b)

the second proviso so that the sup-
iors of the disciplinary authority may
able to judge whether such authority
d exersised its power under Cl. (b)
operly or not with a view to judge the
rformance and capacity of that officer
r the purposes of promotion etc.

(67) It is, however, better for the
sciplinary authority to communicate
the concerned civil servant its reason
r dispensing with the inquiry because
ch communication wouled elimi-
te the possibility of an allegation be-
g made that the reason had been sub-
quently fabicated. It would also en-
le the civil servant to approach the
igh Court under Art. 226 or, in a fit
se, the Supreme Court under Art. 32.

(68) The submission that where
delinquent government servant so
rrorizes the disciplinary authority that
ither that officer nor any other officer
ationed at that place is willing to hold
e inquiry, some senior officer can be
nt from outside to hold the inquiry
nnot be accepted. This submission
self shows that in such a case
e holding of an inquiry is not reasona.
y practicable. It would be illogical to
old that administrative work carried
t by senior officers should be paralysed
st because a delinquent civil servant
ther by himself or along with or thro-
gh others makes the holding of an
quiry by the designated disciplinariy
thority or inquiry officer not reasona-
y practicable.

(69) In a case falling under Cl.
) of the second proviso it is not necessary that the civil servant should be placed under supension until such time as the situation improves and it becomes possible to hold the inquiry because in such cases neither pubic interest nor public good requires that salary or subsistence allowance should be continued to be paid out of the puplic exchequer to the concerned civil servant. It would also be difficult to foresee how long the situation would last and when normalcy would return or be restored. In certain cases, the exigencies of a situation would require that prompt action should be taken and suspending a civil servant would not serve the purpose and sometimes not taking prompt action might result in the troudle spreading and the situation worsening and at times becoming uncontrollable. Not taking prompt action map also be contrued by the trouble-makers as a sign of weakness on the part of the authorities and thus encourage them to step up their activities or agitation. Where Such prompt action is taken in order to prevent this happening, there is an element of deterrence in it but this is an unavoidable and necessary concomitance of such an action resulting from a situation which is not of the creation of the authorities.

(70) The contention that where an inquiry into the charges against a civil servant is not reasonably practicable, none the less before dispensing with the inquiry there should be a preliminary disciplinary inquiry should be dispensed with or not is illogical and is a contradiction in terms If an inquiry into the

charges against a civil servant is not reasonably practicable, it stands to reason that an inquiry into the question whether the disciplinary inquiry should be dispensed with or not is equally not reasonably practicable.

(71) Where a large group of members of the Central Industrial Security Force Unit posted at the plant of the Bokaro Steel Ltd , indulged in acts of insubordination, indiscipline, derelicton of duty, abstention from physical training and parade, taking out processons, shouting inflammatory slogans, participating in the 'gherao, of supervisory officers, going on hunger strike and 'dharna' near the Quarter Guard and Administrative Buiding of the Unit, indulging in threats of violence, bodily harm and other act of intimidation to supervisory officers and loyal members of the said Unit, and thus created a situation whereby the normal functioning of the said Unit of the Central Industrial Security Force was made difficult and impossible, the disciplinary authority was justified in applyng clause (b) of the second proviso to those who were considered responsible for such acts. Cl. (b) of the second proviso to Art. 311 (2) was also properly applied in the cases of those members of the Central Industrial Security Force who were considered responsible for creating a similar situation at Hoshangabad

(72) In cases such as the above, it is not possible to state in the order of dismissal the particular acts done by each of members of the concerned group as such cases are very much like a case under S. 140 of the Indian Penal Code.

(73) In situation Such as the one where a large group acting collectively with the common object of coercing those in charge of the administration of the Central Industrial Security Force and the Government to compel them to grant recognition to their Association and to concede their demands, it is not possible to particularize in the orders of dismissal the acts of each individual member who participated in the commission of these acts. The participation of each individual might be of a greater or lesser degree but the acts of each individual contributed to the creation of a situation in which the security force itself became a security risk.

(74) Railway service is a public utility sevice within the meaning of Cl. (a) of S. 2 of the Industrial Disputes Act, 1947, and the proper running of the raiway service is vital to the country.

(75) Where, therefore, the railway employees went on an illegal all-India strike without complying with the provisions of S. 22 of the Industrial Disputes Act, 1947, and thereby committed an offence punishable with inprisonment and fine under S 26 (1) of the said Act and the situation became such that the railway services were paralysed, loyal workers and superior officers assaulted and intimidated, the country held to ransom, and the economy of the couutry and public inteest and public good prejudicially affected, prompt and immedi-

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e action was called for in order to
ng the situation to normal. In these
cumstances, it cannot be said that an
quiry was reasonably practicable or
at Cl. (b) of the second proviso was
t properly applied. The fact that the
ilway employees may have gone on
ike with the object of forcing the
overnment to meet their demands is
t relevant because their demands
re for their private gain and
their private interest and the railway
nployees were not entitled in seeking
have their demands conceded to
use untold hardship to the public
d prejudically affect public good and
blic interest and the good and interest
the nation.

(76) The quantum and extent of
e penalty to be imposed in cases such
the above would depend upon the
avity of the situation at a particular
ntre and the extent to which the acts
id to be committed by particular civil
rvants, even though not serious in the-
selves, in conjunction with act commi-
ed by others contributed to bringing
out the situation The fact, therefore,
at at a particular centre certain civil
rvants were dismissed from service
ile at some other centres they were
ly removed from service does not
ean that the penalties were arbitrarily
nposed.

XII. Clause (c) of the Second proviso.

(77) The expression "security of
e State" in Cl. (c) of the second pro-
so to Art. 311 (2) does not mean secu-
ty of the entire country or a whole
ate but includes security of a part of a
State.

(78) Security of the State cannot be confined to an armed rebellion or revolt for there are various ways in which the security of the State can be affected such as by State secrets or information relating to defence production or similar matters being passed on to other countries, whether inimical or not to India, or by secret links with terrorists.

(79) The way in which the security of the State is affected may be either open or clandestine.

(80) One of the obvious actes which would affect the security of the State would be disaffection in the armed forces or paramilitary forces or the police force. The importance of the proper discharge of the duties by members of these Forces and the maintenance in discipline among them is emphasized of Art. 33 of the Constitution.

(81) Disaffection in any armed force or para-military force or police force is likely to spread because dissatisfied and disaffected members of such a Force spread dissatisfaction and disaffection among other members of the Force and thus induce them not to discharge their duties properly and to commit acts of indiscipline, insubordination or disobedience to the orders of their superiors. Such a situation cannot be a matter affecting only law and order or public order but is a matter vitally affecting the security of the State.

(82) The interest of the security or the State can be affected by actual

acts or even by the likelhood of such act acting place.

(83) In an Inquiry into acts affecting the interest of the security of the State, several matter not fit or proper to be made public, including the source of information involing a civil servant in such acts, would be disclosed and thus in such cases an inquiry into acts prejudicial to the interest of the security of the State would as much prejudice the interest of the security of the State as those acts themselves would.

(84) The condition for the application of Cl (c) of the second proviso to Art 311 (2) is the satisfaction of the President or the Governor, as the case may be, that it is not expedient in the interest of the security of the State to hold a disciplinary inquiry

(85) Such satisfaction is not required to be that of the President or the Governor personally but of the President or the Governor, as the case may be, acting in the constitutional sense.

(86) "Expedient" means "advantageous, fit, proper, suitable or politic". Where, therefore, the President or the Governor, as the case may be is satisfied that it will not be advantageous or fit or proper or suitable or politic in the interest of the security of the State to hold an inquiry, he would be entitled to dispense with it under Cl. (c) of the second proviso.

(87) Under Cl. (c) of the second proviso the satisfaction reached by the President or the Governor, as the case may be, must necessarily be a subjective satisfaction because expediency involve matters of policy.

(88) Satisfaction of the Presiden or the Governor under Cl. (c) of th second proviso may be arrived at as result of secret information received b the Government about the brewin danger to the security of the State an like matters. There are other factor which are also required to be considere weighed and balanced in order t reach the requisite satisfaction whethe holding an inquiry would be expedien or not. If the requisite satisfaction ha been reached as a result of secre information received by the Govern ment, making known such informatio may very often result in disclosure o the source of such information an once known the particular source fron which the information was receive would no more be available to th Government The reason for the sati sfaction reached by the President or th Governor under Cl. c of the secon proviso cannot, therefore, be require to be recorded in the order of dismis sal, removal or reduction in rank no can it be made public.

(89) The police are the guard ians of law and order. They stan guard at the border between the gree valleys of law and order and the rough and hilly terrain of lawlessness and pub lic disorder, and if these guards tur law breakers and create violent publi disorder and incite others to do th same one can only exclaim with Juvenal "Quit custodier ipsos custodes?"

“Who is to guard the quards themselves?” (Satires, VI, 347). In such a situation prompt and urgent action becomes necessary and the holding of an inquiry into the conduet of each individual member of the police force would not be expedient in the interest of the security of the State.

90. When, therefore, a number of members of the Madhya Pradesh District Police Force and the Madhya Pradesh Special Armed Force, in order to obtain the release on bail of two of their colleagues who had been refused bail and remanded into judicial custody because of an incident which took place at the annual Mela held at Gwalior in which one man was burnt alive, indulged in violent demonstration and rioted at the Mela ground, attacked the police station at the Mela ground, ransacked it and forced the wireless operator to close down the wireless set and the situation became so dangerous that senior district and police officers had to approach the Judicial Magistrate at right to get the two arrested constables released on bail and, after discussion at a Cabinet meeting, a decision was taken and the advice of the Council of Ministers was tendered to the Governor of Madhya Pradesh who accepted it and issued orders of dismissal of these persons by applying Cl. (c) of the second proviso to them, it cannot be said that the provisions of the said Cl (c) were not properly applied.

(91) Similarly, when after these members of the Madhya Pradesh District Police Force and the Madhya Pradesh Special Armed Force were dismissed, some other members of these Force began carrying on an active propaganda against the Government, visiting various places in the State of Madhya Pradesh, hoding secret meetings, distributing leaffets and inciting the constabulary in these places to rise against the administration as a body in protest against the action taken by the Government and, on such information being received they were also dismissed by applying clause (c) of the second proviso to them, it cannot be said that the said Cl. (c) was properly applied.

XIII. Remedies available to a Civil Servant.

(92) A civil servant who has been dismissed, removed or reduced in rank by applying to his case one of the clauses of the second proviso to Art. 31 (2) or an analogous service rule has two remedies available to him. These remedies are :

(i) the appropriate departmental remedy provided for in the relevant service rules, and

(ii) if still dissatisfied, invoking the Court's power of judicial review.

XIV. Departmental Remedies.

(93) Service rules generally provide for departmental remedies by way of an appeal, revison and review in the case of disciplinary action taken against a civil servant.

(94) Sub-clause (ii) Cl. (c) of the first proviso to R. 25 (1) of the Railway Servants (Discipline and Appeal) Rules,

1968, inter alia provides that where an inquiry has not been held, the revising authority shall itself hold such inquiry or direct such inquiry to be held, subject to the provisions of R. 4 of the said Rules which is analogous to the second proviso to Art. 322 (2). Thus, under the said Rules a railway servant has a right to demand in revision an inquiry into the charges against him subject to a situation envisaged in Rule 4 of the said Rules not prevailng at that time.

(95) Although a provision similar to sub-clause (ii) of Cl. (c) of the first proviso to R. 25 (1) of the Railway Servants (Discipline and Appeal) Rules, 1968 does not exist in the rules relating to appeals in the said Ruls, having regard to the factors set out in R 22 (2) of the said Rules which are to be considered by the appellate authority in deciding an appeal, a provision similar to the said sub-clause (ii) of Cl- (c) of the first proviso to R. 25 (1) should be read and imported into the provisions relating to appeals in the said Rules.

(96) Where service rules do not contain a provision similar to sub-clause (ii) of Cl. (c) of the first proviso R. 25 (1) of the Railway Servants (Disciplne and Appeal) Rules, 1968 having regard to the factors to be taken in account by the appellate authority in deciding an appeal, a provision similar to the said sub-clause (ii) of Cl. (c) of R 25 (1) of the Railway Servants (Discipline and Appeal) Rules, 1968, should be read and imported into the provisions relating to appeals and revision contained in such service rules. This would, however, be subject to a situation envisaged by the second proviso to Art. 311 (2) not existing at the time of the hearing of the appeal or revision.

(97) Even in a case where at the time of the hearing of the appeal or revision, as the case may be, a situation envisaged by the second proviso to Art. 311 (2) exists, as the civil servant, if dismissed or removed, is not continuing in service and if reduced in rank, is continung in service with the reduced rank, the hearing of the appeal or revision, as the case may be, should be postponed for a reasonable length of time to enable the situation to return to normal.

(98) An order imposing penalty passed by the President or the Governor, as the case may be, cannot be challenged in a departmental appeal or revision.

(99) A civil servant who has been dismissed or removed from service or reduced in rank by applying to his case one of the clauses of the second proviso of Art. 311 (2) or of an analogous service rule has, therefore, the right in a departmental appeal or revision to a full and complete inquiry into the allegations made against him subject to a situation envisaged in the second proviso to Art. 311 (2) not existing at the time of the hearing of the appeal or revision application. Even in a case where such a situation exists, he has the right to have the hearing of the appeal or revision application postponed for a reasonable length of time

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the situation to become normal.

(100) In an appeal, revision or issed or removed from service or ced in rank by applying to his Cl. (a) of the second proviso or nalogous service rule, it is not open e civil servant to contend that he wrongly convicted by the criminal rt. He can, however, contend the penalty imposed upon him is severe or excessive or was one warranted by the facts and circumces of the case. If he is in fact the civil servant who was actually icted on a criminal charge, he contend in appeal' revision or reagainst such order of penalty that s a case of mistaken identity.

(101) A civil servant who has dismissed or removed from service educed in rank by applying to his Cl (b) of the second proviso to 311 (2) or an analogous service can claim in appeal or revision an inquiry should be held with ct to the charges on which such lty has been imposed upon him s a situation envisaged by the d proviso is prevailing at the ng of the appeal or revision appion. Even in such a case the hearof the appeal or revision applicashould be postponed for a reason. length of time for the situation turn to normal.

(102) In a case where a civil ant has been dismissed or removed service or reduced in rank by app- clause (b) of the second proviso or an analogous service rule to him by reason of Cl. (3) of Art. 311 it is not open to him to contend in appeal, revision or review that the inquiry was wrongly dispensed with.

(103) In a case where a civil servant has been dismissed or removed from Service or reduced in rank by applying Cl. (c) of the second proviso or an analogous service rule to him no appeal or revision will lie if the order of penalty was passed by the President or the Governor. If, however, the inquiry has been dispensed with by the President or the Governor and the order of penalty has been passed by the disciplinary authority (a) position envisaged by Cl. (iii) of Rule 14 of the Railway Servants (Discipline and Appeal). Rules 1980 and Cl. (iii) of R. 19 of the Central Civil Services Classification, Control and Appeal) Rules, 1965); a departmental appeal or revision will lie. In such an appeal or revision, the civil servant can ask for an inquiry to be held into his alleged conduct unless at the time of the hearing of the appeal or revision a situation envisaged by the second proviso to Art. 311 (2) is prevailing. Even in such a situation the hearing of the appeal or revision application should be postponed for reasonable length of time for the situation to become normal. The civil servant, however, cannot contend in such appeal or revision that the inquiry was wrongly dispensed with by President or the Governor.

XV. Judicial Review

(104) Where a clause of the second

proviso to Art 311 (2) or an analogous service rule is applied on an extraneous ground or a ground having no relation to the situation envisaged in such clause or rule, the action of the disciplinary authority in applying that clause would or rule be malafide and, therefore, bad in law and the Court in exercise of its power of judicial review would strike down both the order dispensing with the inquiry and the order of penalty following there upon.

(105) Where a civil servant has been dismissed or removed from service or reduced in rank by applying Cl. (a) of the second proviso to Art. 311 (2) or an analogous service rule and he invokes the Court's power of judicial review, if the Court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or was not warranted by the facts and circumstances of the case or the requirements of the particular government service to which the concerned civil servant belonged, the Court will strike down the impugned order. In such a case, it is, however, not necessary that the Court should always order reinstatemenat. The Court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case. If however, the Court finds that he was not in fact the civil servant who was convicted, it will strike down the impugned order of penalty and order his reinstatement.

(106) In the case of a civil servant
who has been dismissed or remov
from service or reduced in rank by ap
lying Cl. (b) of the second proviso
Art. 311 (2) or an analogous servi
rule, the High Court under Art. 226
this Court under Art. 32 will interfe
on grounds well-established in law f
the exercise of its power of judicial r
view in matters where administrati
discretion is exercised.

(107) The finality given by Cl (
of Art 311 to the disciplinary autho
ity's decision that it was not reasonab
practicable to hold the inquiry is n
binding upon the Court and the Cou
would consider whether Cl (b) of th
second proviso or analogous servi
rule had been properly applied or not.

(108) In examining the relevanc
of the reasons given for dispensing wit
the inquiry the Court will consider th
circumstances which, according to th
disciplinary authority, made it come t
the conclusion that it was not reasonabl
practicable to hold the inquiry. If th
Court finds that the reasons are irrelevant,
the order dispensing with the inquiry
and the order of penalty followin
upon it would be void and the Cour
will strike them down. In considerin
the relevancy of the reasons given by th
disciplinary authoriy, the Court wil
not, however, sit in judgment over th
reasons like a Court of first appeal i
order to decide whether or not the reasons
are germane to Cl. (b) of the secon
proviso or an analogous service rule
The Court must put itself in the plac
of the disciplinary authority and conside
what in the then prevailing situation a

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reasonable man acting in a reasonable manner would have done. It will judge the matter in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a Court-room, removed in time from the situation in question. Where two views are possible, the Court will decline to interfere.

(109) Where it is alleged that Cl. (b) of the second proviso or an analogous service rule was applied mala fide, the Court will examine the charges of mala fides. A mere allegation of mala fides without any particulars of mala-fides will not, however, amount to a plea of mala fides and requires to be ignored.

(110) If the reasons for dispensing with the inquiry are not communicated to the concerned civil servant and the matter comes to court, the Court can direct the reasons to be produced and furnished to the civil servant and if still not produced a presumption should be drawn that the reasons were not recorded in writing and the impugned order would then stand invalidated. Such presumption can, however, be rebutted by a satisfactory explanation for the non-production of the written reasons.

(111) Where a civil servant is dismissed or removed from service or reduced in rank by applying Cl. (c) of the second proviso or an analogous service rule to his case, the satisfaction of the President or the Governor that it is not expedient in the interest of the security of the State to hold an inquiry a subjective satisfaction would not be a fit matter for judicial review.

(112) It is not necessary for the Court to decide the question whether the satisfaction of the President or the Governor has been reached mala fide or is based on wholly extraneous or irrelevant grounds in a case where all the materials including the advice of the Council of Ministers have been produced and such materials show that the satisfaction of the President of the Governor was neither reached mala fide nor was it based on any extraneous or irrelevant ground.

(113) By reason of the express provision of Art. 74 (2) and Art. 163 (3) of the Constitution the question whether any, and if so what, advice was tendered by the Ministers to the President or the Governor, as the case may be, cannot be inquired into by any Court.

(114) Whether the Court should order production of the materials upon which the advice of the Council of Ministers to the President or the Governor, as the case may be, was based in order to determine whether the satisfaction of the President or the Governor was arrived at mala fide or was based on wholly extraneous or irrelevant grounds would depend upon whether the documents fall within the class of privileged documents and whether in respect of them privilege has been properly claimed or not.

7. In Tulsiram Patel's case where appeals filed by certain dismissed members of the Central Industrial Security Force had not been disposed of by the appellate authority the majority judgment directed the appellate authority to dispose of such appeals as expeditiously as possible. In those matters where civil servants had been dismissed or removed from service by applying to their cases Cl. (b) of the second proviso to Art 311 (2) or an analogous service rule, the Court gave such civil servants time to file appeals and directed the concerned appellate authority to condone in the exercise of its power under the relevant service rule, the delay in filing such appeals.

8. It is important to note that the majority judgment in Tulsiram Patel's case is more beneficial to civil servants and confers greater rights upon them than Challappan's case (AIR 1975 SC) 2216 did. According to Challappan's case, a civil servant to whom a service rule analogous to the second proviso to Art. 311 (2) is sought to the applied has only the right to be heard with respect to the penalty proposed to be imposed upon him. The majority judgment in Tulsiram Patel's case has, however, conferred upon the civil servants who have been dismissed or removed from service or reduced in rank by applying the second proviso to Art. 311(2) or an analogous service rule the right to full and complete inquiry in an appeal or revision unless a situation envisaged by the second proviso is pervailing of the time of the hearing of the appeal or revision application. Even in such a case under the majority judgment the hearing of appeal or revision application is to be posponed for a reasonable length of time for the situation to become normal.

The Facts of the Two Civil Appeals.

9. Having seen what was decided in Tulsiram Patel's case we now turn to the fact of the two Civil Appeals before us The facts of both these Appeals are common. All the Appellants were employees of the Research and Analysis Wing ("RAW", in short), Cabinet secretariat, Government of India.

10. In 1904 an Intelligence Bureau had been formed which was reorgaized in1968. Originally the Intelligence Bureau was concerned both with domestic and international intelligence. In 1968, a branch of the Intelligence Bureau was set up as a separate department and the Intelligence Bureau since that time was concerned with only domestic affairs while the RAW was concerned with international affairs and under-cover activities pertaining to national security : Certain cadres of employees of the RAW formed an Association under the name of "The Cabinet Secretariat (Research and Analysis Wing) Employees Association (Reged)." The said Association submitted a charter of demands. We are not concerned in these Appeals with the reasonableness or otherwise of the said demands.

11. Earlier, the different branches and departmente of the RAW in New Delhi were scattered in serveral buildings.

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imately, a new building was constru-
d for the RAW at Lodhi Road. In
said building the Counter Intellig-
e Section ("CIS", for short) was
sed. The other departments were
sed in the South Block and at R.
Puram. After the CIS was shifted
the building at Lodhi Road, strict
urity measures were introduced and
employees, when going from one fl-
to the other had to show their car-
This was resented by the employees
l they demanded the withdrawal of
s regulation and insisted that the id-
ification check should be made only
the time of entering the buildings.
is demand can only be characterized
wholly unreasonable. The RAW is
ecurity and intelligence section of the
vernment of India dealing with many
sitive matters affecting national
urity and relations with other count-
s including counter intelligence. The
sic rule of intelligence work is that
person engaged in it should know
re than what he needs to know. It is
this reason that when an outside agent
mployed for espionage, care is taken
see that he does not know who his
l employers are but knows only the
me of his contact man which name is
erally an alias Employees of an
elligence service cannot, therefore, be
best judges of what security measur-
should be adopted to prevent secrets
m leaking out

12 To return to our narrative, in
forenoon November 27, 1980, a nu-
er of staff members collected in the
leries leading to the CIS rooms, protesting against the said security regulation and demanding its immediate withdrawal, All attempts to pacify them proved unsuccessful. More and more employees joined them and they turned aggressive, breaking into the various rooms of the CIS unit. Several persons forced their entry into the room of the Director (CIS) ond forced him as also the Assistant Director and the-Security Field Officer who were in the room to stand in a corner and did not allow them to move from the spot but kept them as hostages in order to have their demand conceded The employees who had gathered there shouted slogans against the organization and its officers. These slogans were obscene, abusive, threatening, and personal in nature. All attempts made by senior officers to pacify them proved unsuccessful and the employees made it clear that they would not let the said three officers go unless the Director of the Counter intelligence Section announced the withdrawal of the said security regulation. This state of affairs continued until late in the evening. Ultimately, the local police were sent for and about 8.30 p m the local police entered the premises and went to the galleries in front of the CIS branch. Some of the agitators who were in the gallery escaped. Those inside the said room closed the door to prevent the police party from entering it but police forced open the door and rescued the said three officers Thirty-one agitators who were found inside the room were arrested and char-

ged under Ss. 342, 506, 353, 186, 332 and 333 of the Indian Penal Code and S. 7 of the Criminal Law Amendment Act, 1952. They were subsequently released on bail by the Judicial Magistrate. These arrested employees were suspended under Cl. (b) or sub-rule (1) of S 10 of the Central Civil Services (Classification, Control and Appeal) Rules : 1965, as a criminal case against them was under investigation.

13. The next day, namely, on November 28, 1980, the agitation continued and many employees did not perform their duties. Instead, they collected inside the building and in the premises in groups stopping work in many branches. A large number of them went round shouting slogans and made speeches in the corridors of the office. On November 29, 1980, a letter was issued the said Association demanding the immediate withdrawal of the criminal cases against the said employees as also of the said security regulation. The letter stated that unless these demands were met, the employees would go on a pen-down strike with immediate effect. Thereupon, orders of suspension orders were issued against thoes who were taking a leading, active and aggressive role in the agitation and indulging in these activities. The said suspension orders were issued from the 1st Decemder 1980 onwards but thedown strike continued and spread to other offices of the RAW in New Delhi as well as in different parts of India including Lucknow and Jammu. Daily the situation worsened. There was com-

plete insubordination and total bre
down of discipline. The atmosph
was charged with tension and th
did not seen any hope of the situat
becoming normal. Ultimately,
seven Appellants in Civil Appeal
242 of 1982 and the sole Appellan
Civil Appeal No 576 of 1982 w
dismissed by orders dated Decem
6,1980, without holding any inquiry
applying to them Cl. (b) of the seco
proviso to Art. 311 (2) read with
19 of the said Rules. Thereupon a
petition was filed in the Delhi H
Court. At the date of the filing of
said writ petition only Appellants N
1 to 3 in Civil Appeal No. 242 of l
had been served with the orders of d
missal, while the remaining Appella
and Respondents Nos. 4 to 44 in C
Appeal No. 242 of 1982 joined in
said writ petition as co-petitioners
gether with the Combined Secreta
(Research and Analysis Wing) Empl
ees Association(Regd), contending t
similar action of dismissal was be
apprehended by them. Pending the s
writ petition the orders of dismi
were also served upon the remain
Appellants During the course of
hearing of the said writ petitio
statement was made to the High Co
on behalf of the Union of India t
the other petitioners would not be
missed without holding a regular
quiry. The said writ petition, the
fore, proceeded only so far as the Ap
llants in these two Appeals were co
erned. A Division Bencn of the s
High Court dismissed the
petition by its judgment and

der dated September 25, 1981,

It is against this judgment and order of the said High Court, that these two Appeals by Special Leave have been preferred.

The Impugned Order of Dismissal

14. All the eight impugned orders of dismissal were in identical terms and it will, therefore be sufficient to reproduce the order of dismissal passed against the First Appellant in Civil Appeal No. 242 of 1982. The said order reads as follows :

"No 3/ADMN/80-6486 (N)
Government of India
Cabinet Secretariat,
Room No. 8-B, South Block
New Delhi, the 6th Dec., 1980

ORDER

Whereas a large number of employees of the Cabinet Secretariat (R & AW) located at Delhi have for some time past been indulging in various acts of misconduct indiscipline, intimidation and insubordination, such as abstaining from work, wilful neglect of the duties assigned to them and disobedience lawful instructions and orders of the official superiors;

and whereas the said employees are also regularly holding meetings and demonstrations unauthorisedly and in violation of specific orders, within the office premises and its precincts;

and where the said employees have resorted to coercion, intimidation and incitement of other fellow employees which has a serious demoralizing effect on the members of the organization and whereas such of the said employees is unbecoming of a Government servant and is in gross violation of the Central Civil Services (Conduct) Rules, 1964;

and whereas Shri Satyavir Singh, Field Assistant, is one of the said employees actively participating in such activities;

and whereas due to the practice of coercion, intimidation and such like threat and postures adopted by the said employees the atmosphere is so tense and abnormal that no witness will cooperate with any proceedings in accordance with provisions of the Central Civil Services (Classification, Control and Appeal) Rules, 1965;

and whereas I am satisfied that the circumstances are such that it is not reasonably practicable to hold a regular enquiry as contemplated by the Central Civil Services (Classification, Control and Appeal) Rules, 1965;

and whereas on a consideration of the facts and circumstances of the case, I am satisfied that the penalty of dismissal from service should be imposed on Shri Satyavir Singh, Field Assistant;

Now, therefore, in exercise of the powers under the proviso (b) of Cl. (2) of Art 311 of the Constitution read with R. 19 of the Central Civil Services (Classification Control and Appeal) Rules, 1965, I as the appointing authority do hereby dismiss Shri Satyavir Singh from the post of Field Assistant in the R and AW with effect from the forenoon of December 6, 1980.

Sd/-
6-12-80
(H.N. KAK)
Joint Director"

Contentions

15. Though several contentions were raised in the said writ petition, in view of the judgment in Tulsiram Patel's case (AIR 1985 SC 1416) the only contention taken at the hearing of these two Appeals was that the said order of dismissal were passed mala fide and the reasons given therein for dispensing with the inquiry were not true and that an inquiry was reasonably practicable Several points were urged in support of this contention.

16 The first point was that the orders of suspension showed that a disciplinary inquiry was in fact contemplated and, if so, nothing had happened between the date of the orders of suspension and the date of the orders of dismissal to come to the conclusion that the inquiry was not reasonably practicable. Each order of suspension stated that the concerned employees was being suspended in the exercise of the powers conferred by R. 10 (1) of the said Rules because a disciplinary proceeding against him under R. 14 of the said Rules contemplated Cl. (a) of R. 10 (1) confers power upon a disciplinary authority to place the government servant under suspension where a disciplinary proceeding against him is contemplated or is pending Rule 14 prescribes the procedure for imposing major penalties. One of the major penalties set out in R. 11 is the penalty of dismissal from service. It is thus clear that at the date of the order of of suspension disciplinary proceedings against the Appellants was in contemplation This, however, does not mean that the situation will continue to be the same and that at no time thereafter will the holding of the inquiry become "not reasonably practicable". As pointed out in. Tulsiram Patel's case, it is not necessary that a situation which makes the holding of an inquiry not reasonably practicable should exist before the disciplinary inquiry is initiated, because a situation which renders the holding of an inquiry not reasonably practicable can come into being even during the course of an inquiry. The affidavits filed in the High Court clearly show that the situation had so changed after the orders of suspension were issued against the Appellants that it was not reasonably practicable to hold any inquiry against the Appellants. The all-India pen-down strike was spreading. More and more centres in India were joining in the said strike. The position was fast deteriorating Employees were being instigated into further acts of indiscipline and insubordination and loyal employees and senior officers were being intimidated. Meetings and demonstrations were regularly being held within the office premises and their precincts and there was no possibility of any witness coming forward to give evidence agains the Appellants who were said to have taken a leading part in this agitation It is also pertinent to note that when the first batch of dismissal orders

was served upon some of the Appellant s on December 8, 1980, the pen-down strike was called off on December 9, 1980. In such a situation as was then prevailing, prompt and urgent action was required to bring the situation under control. As pointed out in Tulsiram Pate's case (AIR 1985 SC 1416), sometimes not taking prompt action may result in the trouble spreading and the situation worsening and at times becoming uncontrollabe, and may at times be also construed by the trouble makers and agitators as a sign of weakness on the part of the authorities and encourage them to step up the tempo, of their activities or agitation. The affidavits filed in the High Court clearly show that is exactly what happend when the suspension orders were issued and that what was required was prompt and urgent action against those who were considered to be the ring leaders and that once such action was taken the situation improved and started becoming normal.

17. The next point which was urged was that while eight employees were dismissed for their part in the agitation which took place in Delhi, in respect of the agitation which took place in the Lucknow office of the RAW only two employees of that office were dismissed and, therefore, there was no application of mind on the part of the disciplinary authority. It is very difficult to understand this argument. We do now how (not know?) what precisely the situation at Lucknow was and how many employees were actively engaged in leading the agitation and the fact that it was thounht fit to dismiss only two employees of the Lucknow Office cannot lead to the conclusion that the Appellants were wrongly dismissed without any application of mind.

18. The next point which was urged was that even on December 6, 1980, a suspension order was issued against one of the employees and that on December 9, 1980, suspension orders were issued against two other employees, and that the issuance of these suspension orders on the 6th and 9th December show that the holding of the inquiry was reasonably practicable. As the charge-sheets issued against these three employees show, these employees were working in the R. K. Puram Office and are not alleged to have taken any leading part in the agitation or in bringing about the atmosphere of violence, insubordination and indiscipline

19. The next point was that it was not alleged by the authorities that anyone was physically iniured in the agitation. This is another argument which is difficult to understand. As held in Tulsiram Patel's case (AIR 1185 SC 1419) it will not be reasonably practicable to hold an inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails. It is, therefore, not necessary that the disciplinary authority should wait until incidents take place in which physical injury is caused to others before dispensing with the inquiry.

20. It was next submitted that

after the suspension orders, the Appellants were prohibited from visiting any of the Cabinet Secretariat Offices except for the purpose of collecting their dues and that to with prior permission and that, therefore, they could not have held any meeting or demonstration inside the office premises. There is no substance in the submission The admitted position is that the Appellants were regularly coming to the office building and talking with other employees over the wall and at the gate twice a day at 11.30 a.m. and 3.30 p.m. and were making inflammatory speeches and holding out threats.

21. The point which was next urged in support of the contention that the impugned ordes were passed malafide was that even though co-workers may not have been available as witnesses there were police men and police officers posted inside and outside the building and they were available to give evidence and that superior officer were also available to give evidence. The crucial and material evidence againt the Appellants would be that of their co-workers for these co-workers were directly concerned in and were eyewitnesses to the various incidents. Where the disciplinary authority feels that crucial and material evidence will not be available in an inquiry because the witnesses who could give such evidence are intimidated and would not come forward and the only evidence which would be available, namely, in this case, of policemen, police officers and senior officers, would only be peripheral and cannot relate to all th charges and that, therefore, leadin only such evidence may be assailed i a Court of law as bring a mere farc of an inquiry and a deliberate attemp to keep back material witnesses, th disciplinary authority would be justified in coming to the conclusion tha an inquiry is not reasonably practicable. The affidavit filed by the Join Director, Research and Analysis Wing Cabinet Secretariat, Hari Narain Kak who had passed the impugned order sets out in detail the various acts c intimidation, violence and incitemen committed by each of the Appellant Copies of the written reason for dispensing with the inquiry in the cas of the Appellants have also been annexed to the said affidavit. It is clea from a perusal of the said affidavit an its annexures that the police officers policemen and senior officers could nc have possidle given evidence with respect to all these acts. The said affidavit further states that the senior officers were also intimidated and wer threatened with dire consequences i they gave evidence Further, grievance were made against the senior officer of the RAW in the said charter of demands submitted by the said Association and the evidence of senior officer would have been attacked as deing biased and partisan. There is thus nc substance in this point also.

22. The last point which was urged was that D.P. Vohra, the Appellants in Civil Appeal No.576 of 1982, was posted at Jammu and could not, there

ore, have taken any active part in the gitation which took place in Delhi. This submission is completely belied y the said affidavit of Hari Narain Kak. The said affidavit shows that uring the relevant time Vohra had aken leave for personal reasons and ad come down to Delhi and had play-d an active role in the said agitation. He made inflammatory speeches on the st, 3rd, 4th and 5th December, 1980 nd had instgated the other employees o continue the agitation and intimi-lated those who had not joined in the gitation into doing so. In a speech nade by him on December 4, 1980; he ead tried to make public some of the op secret operations of the RAW laiming to have special knowledge of hese operations by virtue of having been osted earlier in a sensitive branch. He was also actively engaged in colle-ting funds for continuing the agitation.

23. We are, therefore, of the pinion that Cl. (b) of the second pro-iso to Art. 311 (2) and Rule 19 of the Central Civil Services (Clasisfication nd Appcal) Rules, 1965, were properly pplied to the case of each of the Appe-lants and the impugned orders of dismissal were validly passed against them.

Final Orders

24. In the result, both these Appeals fail are dismissed and the interim orders passed in these Appeals are hereby vacated. If any payment has been made to any of the Appellants in pursuance of any interim order, such Appellant will not be liable to refund such amonut or any part there of. The Appellants have a right to file a departmental appeal under the Central Civil Services (Classification, Control and Appeal) Rules, 1985. In case they desire to fill suce an appeal, we give them time until October 31, 1985, to do so and we direst the appellate authority to codone in the exercise of its power under the proviso to Rule 25 of the said Rules the delay in filling the appeal and to hear and dispose of such appeals expeditiously subject to what has been laid down in Tulsiram Patel's case (AIR 1985 SC 1416) and summarized in the earlier part of this judgment.

25. There will bs no order as to the costs of these Appeals.

Order accordingly

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

O. Chinnappa Reddy
Judge
Supreme Court of India

OBSERVATION

'Equal pay for equal work"—Doctrine of, is required to be applied to persons nployed on a daily wage basis—They are entitled to same wages as are paid to simi-.ry employed employees—Constitution of India, Art. 39.

OBSERVED BY

O. Chinnappa Reddy and
V. Balakrishna Eradi

Hon'ble Judges Supreme Court of India.

IN

Writ Petn. (Civil) Nos. 59-60 and 563-70 of 1983 decided on 17-1-1986 between urinder Singh and another, Petitioners v. The Engineer in Chief, C.P.W.D., and thers, Respondents.

TEXT

Chinnappa Reddy, J.—In these vo writ petitions, the petitioners who e employed by the Central Public Vorks Department on a daily-wage asis and who have been so working r several years, demand that they hould be paid the same wages as permaent employees employed to do identical ork' They state that even if it is not ossible to employ them on regular and ermanent basis for want of a suitable umber of posts, there is no reason hatsoever why they should be denied qual pay for equal work' In a simir petition filed by employees of the ehru Yuvak Kendras, Civil Writ Petns. os. 4821 and 4817 of 1883, Dhirendra Chameli & Anr. v. State of U.P., a ench of this court consisting of Bhagvati, C.J. and Amarendra Nath Sen, J. sued the following directions :

"We, therefore, allow the writ petitions and make the rule absolute and direct the Central Government to accord to these persons who are employed by the Nehru Yuvak Kendras and who are concededly performing the same duties as class IV employees, the same salary and conditions of service as are being received by class IV employees, except regularisation which cannot be done since there are no sanctioned posts. But we hope and trust that posts will be sanctioned by the Central Government in the different Nehru Yuvak Kendras, so that these persons can be regularised. It is not at all desirable that any management and particularly the central Government should continue to employ persons on casual basis in organisations which have been in existence for over 12 years. The salary

**O. Chinnappa Reddy
Judge
Supreme Court of Indi**

and allowances of class IV employees shall be given to these persons employed in Nehru Yuvak Kendras with effect from the date when they were respectively employed."

Earlier the court also observed that it was a peculiar attitude to take on the part of the Central Government to say that they would pay only daily-wages and not the same wages as other similarly employed employees, though all of them did identical work. The court said :

"This argument lies ill in the month of the Central Government for it is an all too familiar argument with the exploiting class and a Welfare State committed to a socialist pattern of society cannot be permitted to advance such as an argument. It must be remembered that in this country where there is so much unemployment, the choice for the majority of people is to starve or to take employment on whatever exploitative terms are offered by the employer. The fact that these employees accepted employment with full knowledge that they will be paid only daily wages and they will not get the same salary and conditions of service as other class IV employees, cannot provide an escape to the Central Government to avoid the mandate of equality enshrined in Article 14 of the Constitution. This Article declares that there should be equality before law and equal protection of the law and implicit in it is the further principle that there must be equal Pay for work of equal value
……………………It makes no differen
whether they are appointed in sancti
ned posts or not. So long as they a
performing the same duties, they mu
receive the same salary and conditio
of service as Class IV employees."

One would have thought that th
judgement in the Nehru Yuvak Kendra
case (supra) concluded further arg
ment on the question. However, Sh
V.C. Mahajan, learned counsel for th
Central Government reiterated the sam
argument and also contended that th
doctrine of 'equal pay for equal wor
was a mere abstract doctrine and tha
it was not capable of being enforced i
a court of law. He referred us to th
observations of this court in Kisho
Mohanlal Bakshi v. Union of Indi
AIR 1962 SC 1139. We are not a littl
surprised that such an argument shoul
be advanced on behalf of the Centr
Government 36 years after the passin
of the Constitution and 11 years aft
the Forty-Second Amendment procla
iming India as a socialist republic. Th
Central Government like all organs o
the State is committed to the Directiv
Principles of State Policy and Art. 3
enshrines the principle of equal pay fo
equal work. In Randhir Singh v. Un
on of India, (1982) 3 SCR 298 : (AI
1982 SC 879), this court had occasio
to explain the observations in Kisho
Mohad Lal Bakshi v. Union of Indi
(supra) and to point out how the princ
ple of equal pay for equal work is no
an abstract doctrine and how it is
vital and vigorous doctrine accepte
throughout the world, particularly b

O. Chinnappa Reddy
Judge
Supreme Court of India

ll socialist countries. For the benefit f those that do not seem to be aware f it, we may point out that the decision n Randhir Singh's case has been followed in any number cases by this ourt and has been affirmed by a Consttution Bench of this court in D.S Nakara v. Union of India, (1983) 2 SCR 65. The Central Government, the State Governments and likewise, all public ector under-takings are expected to unction like model and enlightened mployers and arguments such as those vhich were advanced before us that the principle of equal pay for equal work s an abstract doctrine which cannot be nforced in a court of law should wellome from the months of the State and State Undertakings. We allow both the writ petitions and direct the respondents, as in the Nehru Yuvak Kendra's case (supra) to pay to the petitioners and all other daily rated employees, the same salary and allowances as are paid to regular and permanent employees with effect from the date when they were respectively employed. The respondents will pay to each of the petitioners a sum of Rs. 1000/- towards their costs. We also record our regret that many employees are kept in service on a temporary daily-wage basis without their services being regularised. We hope that the Government will take appropriate action to regularise the services of all those who have been in continuous employment for more than six months.

Petitions allowed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

R. S. Pathak
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Arts. 341, 14—Constitution (Scheduled Castes) order, 950 Para 3—Scheduled Castes member converting to Christianity—Disabilities and andicaps do not continue after conversion—Order is not discriminatory.

OBSERVED BY

P. N. Bhagwati, and R. S. Pathak
and Amarendra Nath Sen
Hon'ble Chief Justice and Judges supreme Court of India.

IN

Writ Petns. Nos. 9596 of 1983 and 1017 of 1984, decided on 30. 9. 1985 between oosai etc., Petitioners v. Union of India and others, Respondents.

And

Movement for Protection of Human Rights of Marginalis Communities through s Secretary, Petitioner v. Union of India and others, Respondents.

TEXT

Pathak, J. :—This and the connected writ petitions raise the important quesion whether the Constitution (Schedued Castes) order, 1950 is constitutionlly invalid on the ground that only Hindu or Sikh members of the castes numerated in the Schedule to that orer are deemed to be Scheduled Castes or the purposes of the Constitution of ndia.

2. The petitioner Soosai (in Writ Petition No. 9596 of 1983) states that he belongs to the Adi-Dravida Commuity and is a convert to Christianity. He is a cobbler by profession and works on the roadside at one of the cross-rods Madras In May, 1982, the officers of the Tamil Nadu khadi and village Industries Board surveyed the sites on which cobblers were working, including the place occupied by the petitioner, and subsequently on July 27, 1982 several cobblers were allotted bunks free of cost by the Regional Deputy Director, khadi and village Industries Board. The petitioner was not. On enquiry the petitioner came to know that the allotment of bunks free of cost was consequent to a proposal under the special Central Assistance Scheme of the Government of India for the welfare of Scheduled Castes. The funds for the purpose were provided from the special Central Assistance of the Government of India set up for giving effect to schems exclusively intended for Scheduled Castes under G.O. Ms. No 580 Social Welfare Department dated February 13, 1982. It is pointed out that this Order

specifically states that persons belonging to the Scheduled Castes and converted to Christianity are not eligible for assistance under the scheme. The petitioners points out that the saied order has been made in consonanc-- with the Constitution (Scheduled Castes) order, 1950, which specifically declares that no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of scheduled Castes. The petitioner assails the validity of that order on the ground that it violates, Art. 14, 15 and 25 of the Constitution.

3. The essence of the petitioner's case is that he was a Hindu belonging to the Adi-Dravida caste and on conversion to Christianity he continues as a member of that caste. The Adi-Dravida caste is one of the castes enumerated in the Shedule to the Constitution (Scheduled Castes) order, 1950. The petitioner alleges that he has been denied the benefit of welfare assistance intended for Scheduled Castes on the ground that he professes the Christian religion, and he contends that inasmuch as such discrimination has been effected pursuant to the provision contained in paragraph 3 of the Constitution (Scheduled Castes) Order, 1950, that provision is constitutionally invalid. The petitioner invokes, Art. 14, which is the Central provision in the Constitution guranteeing the right to equality before the law and equal protection of the law, and Cl. (1) of Art 15 which prohibts the State from discriminating against any citizen on the ground only, among others, of religion. It is pointed out that when Cl. (4) of Art. 15 permits the State, notwithstanding the prohibition contained in Cl. (1) of Art 15, to make special provision for the advancement of socially and educationally backward classes of citizens and for the Scheduled Castes and Scheduled Tribes, it envisages such special provision for the advancement of all members of such backward classes of citizens, Scheduled Castes and Scheduled Tribes. If any discrimination is exercised between the members of a Scheduled Caste on the ground of religion only so as to promote the welfare of one group of members and deny it to the others the denial will be invalid. Reference has also been made to Art. 25 on the ground that a Christian convert will be tempted to reconvert to Hinduism or Sikhism in order to benefit from the constitutional provisions relating to Scheduled Castes and therefore paragraph 3 in its operation denies him freedom of conscience and the right freely to profess, practise and propagate his religion.

4. The framers of the Constitution have taken great care to ensure that sufficient is made for ameliorating the conditions of certain backward classes found in India who suffer from social and ceonomic disabilities Art. 46 enjoins upon the State as a Directive Principle of State Policy, to promote with special care the educational and economic interests of the weaker sections of the people, and in

R. S. Pathak
Judge
Supreme Court of India

rticular of Scheduled Castes and
heduled Tribes, and to protect them
m social injustice and forms of ex-
oitation. In consonance with this
jective they enacted a number of
ovisions in the Constitution, of
ich Cl. (4) or Art. 15 is one. Besi-
, although Cl. (1) of Art. 16
arantees equality of opportunity to
citizens in matters relating to empl-
ment or appointment to any office
der the State, there is Cl. (4) of
t. 1 which lays down that not-
g in Art. 16 will prevent the State
m making any provision for the re-
vation of appointment or posts
favour of any backward class of
izens which, in the opinion of the
te, is not adequately represented
the services under the State Art.
abolishes "Untouchability" and for-
ls its practice in any form, and de-
res that the enforcement of any dis-
ility arising out of "Untouchability',
l be an offence punishable in acc-
dance with Law. There are other
ovisions, such as Art. 330 which
ovides for the reservation of seats
the House of the People for Sched-
d Tribes and Art. 332 which makes
ilar provision for the reservation
seats for them in the State Legis-
ive Assemblies. We are concerned
re with the advantages and benefits
visaged by the Constitution in re-
ect of members of the Scheduled
stes.

5. The expression "Scheduled
stes" is defined in Cl. 24 of Art.
366 to mean "such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Art. 341 to be Scheduled Castes for the purposes of this Constitution". Clause (1) of of Art. 341 enjoins upon the President to specify by public notification the castes, races or tribes, which for the purposes of the Constitution are deemed to be Scheduled Castes in relation to a State or Union territory. Once such notification is issued by the President it cannot be varied by any subsequent notification encept that, by virtue of Cl. (2) of Art. 341, Parliament may by law include in or exclude from the list of Scheduled Castes specified in the notification issued under Cl. (1) any caste, race or tribe or part of or group within any caste, race or tribe. In discharge of the obligation imposed by Cl. (1) of Art. 341 the president issued the Constitution (Scheduled Castes) Order 1950. In its original form, paragraph 3 declared that"..........no person who peofesses a religion different from Hindu would be deemed to be a member of a Scheduled Castes. There was a proviso to paragraph 3 which declared that every member, of the Ramdasi Kabirpanthi, Mazhabi or Sikligar caste resident in Punjab or the Patiala and East Punjab States Union would in relation to that State be deemed to be a member of the Scheduled Castes whether he professed the Hindu religion or the Sikh religion. Subsequenly, Parliament enacted the

Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1956 which substituted for the original paragrph 3 the present paragraph, which declares:—

"3. Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu or the Sikh religion Shall be deemed to be a member of a Scheduled Caste."

It is apparent that for purposes of the Constitution the constitutional provisions relating to Scheduled Castes are intended to be applied to only those members of the castes enumerated in the Constitution (Scheduled Castes) Order, 1950 who profess the Hindu or the Sikh religion. Clearly, if it can be contemplated that a Christian belongs to one of those castes, he is barred by reason of paragraph 3, from being regarded as a member of a Scheduled Caste and is, therefore, not entitled to the benefit of the constitutional provisions relating to Scheduled Castes.

6. The main question debated us is whether a Hindu belonging to a Scheduled Caste retains his caste on conversion to Christianity. Cases decided by this Court and by the High Courts bearing on the point have cited on both sides of the line, and our attention has been invited to text books, Commentaries and Commission Reports, some of which contain the observation that depressed groups and castes are to be found not only among Hindus and Sikhs but also among Muslims an Christians It appears to us unn cessary in this case to enter upo that question and to decide wheth a Hindu belonging to the Adi Dravid caste continues to be a memb of that caste on his conversion to t Christian religion. We shall assum for the purposes of this case, that t caste is retained on coversion from o religion to the other. The real ques ion is whether on the material befo us it can be said that in confining t declaration to members of the. Hin and the Sikh religions, paragraph 3 the Constitution (Scheduled Caste Order, 1950 disciminates against me bers of the Christian religion.

7. Now it cannot be disputed th the caste system is a feature the Hindu social structure. It is social phenomenon peculiar to Hin society. The division of the Hin social order by reference at one time professional or vocational occupati was moulded into a structuural hier rchy which over the centuries crystalli ed into a stratification where the pla ot the individual was by birth. Tho who occupied the lowest rung of t social ladder were treated as existi beyond the periphery of civilised socie and were indeed not even "touchabl This social attitude committed tho castes to severe social and econom disabilities and cultural and education backwardness. And through most Indian history the oppressive natu of the caste structure has denied those disadvantaged castes the funda

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ntals of human dignity, human self–
espect and even some of the attributes
f the human personality. Both history
nd later day practice in Hindu society
re heavy with evidence of this oppres-
ive tyranny, and despite the afforts of
everal noted social reformers, specially
uring the last two centuries, there has
een a crying need for the emancipation
f the depresses classes from the degrad-
g coditions of their social and econo-
ic servitude. Dr. J. H. Hutton, a Cens-
s Commissioner of India, framed a list
f the depressed classes systematicatic-
lly, and that list was made the basis of
n order promulgated by the British
overnment in India called the Govern-
ent of India (Scheduled Castes) Order,
936. The Constitution (Scheduled Castes)
rder, 1950 is substantially modelled
n the Order of 1936 The Order of
936 enumerated several castes, races
r tribes in an attached Schedule and
ey were, by paragraph 2 of the Order,
eemed to be Scheduled Castes Para-
raph 3 of the same Order declared
at the Indian Christians would not
e deemed to be members of the Sche-
uled Castes. During the framing of
e Constitution, the Constituent
ssembly recognised "that the Sche-
uled Castes were a backward section
f the Hindu community who were a
andicapped by the practice of untou-
ability", and that "this evil practice
f untouchability was not recognised
y any other relegion and the question
f any Scheduled Caste belonging to a
eligion other than Hinduism did not
erefore arise." B. Shiva Rao : the
Framing of India's Constitution : A study p. 771. The sikhs however, demanded that some of their backward sections, the Mazhabis, Ramdasias, Kabirpanthis and Sikligars, should be included in the list of Scheduled Castes. The demand was accepted on the basis that these sects were origionally Schedu-Caste Hindus who had only recently been converted to Sikh faith and "had the same disabilities as the Hindu Scheduled Castes", Supra p. 771. The depressed classes within the fold of Hindu Society and the four classes of the Sikh community were therefore made the subject of the original Constitution (Scheduled Castes) Order, 1950. Subsequently in 1956 the Constitution Scheduled Castes) Order, 1950 was amended and it was broadened to include all Sikh untouchables.

8. It is quite evident that the President had before him all this material indicating that the depressed classes of the Hindu and the Sikh communities suffered from economic and social disabilities and cultural and educational backwardness so gross in character and degree that the members of those castes in the two communities called for the protection of the Constitutional provisions relating to the Scheduled Castes. It was evident that in order to provide for their amelioration and advancement it was necessary to conceive of intervention by the State through its legislative powers. It must be remembered that the declaration incorporated in paragraph 3 deeming them to be members of the Scheduled

Castes was a declaration made for the purposes of the Constitution. It was a declaration enjoined by clause (1) of Article 341 of the Constitution. To establish that paragraph 3 of the Constitution (Scheduled Castes) Order, 1950, discriminates against Christian members of the enumerated castes it must be shown that they suffer from a comparable depth of social and economic disabilities and cultural and educational backwardness and similar levels of degradation within the Christian community necessitating intervention by the State under the provisions of the Constitution. It is not sufficient to show that the same continues after conversion. It is necssary to establish further that the disabilities and handicaps suffered from such Caste membership in the social order of its origin—Hinduism—continue in their oppressive severity in the new environment of a different religious community. References have been made in the material before us in the most cursory manner to the character and incidents of the cates within the Christian fold, but no authoritative and detailed study dealing with the present conditions of Christian society have been placed on the record in this case. It is therefore, not possible to say that the President acted arbitrarily in the exercise of his judgment in enacting paragraph 3 of the Constitution (Scheduled Castes) order, 1950. It is now well established that when a violation of Article 14 or any of its related provisions is alleged, the burden rests on the petitioner to establish by clear and cogent evidence that the State has been guilty of arbitrary discrimination Havin regard to the State of the record before us, we are unable to hold that the petitioner has established his case. The challenge must, therefore, fail.

9. In the connected writ petition No. 1017 of 1984 the submissions have proceeded substantially on the same grounds, and relief has been sought additionally against a Circular Letter No. 21711/ADWH/80-26 dated, August 16/25, 1983 issued by the Government of Tamil Nadu to the Tamil Nadu Public Service Commission stating that "Scheduled Caste" Christians who revert to Hinduism and on that basis obtain appointments to reserved seats in Government services, and having done so change their religion once again after their entry into Government service are liable to have their selection cancelled. On the considerations which have prevailed with us in dismissing the earlier writ petition, this writ petition must also be dismissed.

10. The writ petitions are nismissed but without any order as to costs.

Petitions dismissed.

OBSERVATION

Probationer—Termination of his service prior to expiry of extended probationary eriod—Non-payment of notice salary before termination—No illegality—Constitution India, Arts 309, 311(2)—Central Civil Services (Temporary Service) Rules (1965), . 5(1) (b) proviso (as amended in 1971).

OBSERVED BY

A. P. Sen and V. Khalid

Hon'ble Judges Supreme Court of India.

IN

Civil Appeal No. 1213 of 1982 decided on 23.1.1986 between Union of India d others, Appellants v. Arun Kumar Roy, Respondent.

TEXT

V. Khalid, J. :—This appeal by Sp- ial Leave is directed against the Judg- ent rendered by a Division Bench of e Calcutta High Court on 7-12-1981, tting aside, in appeal, the Judgment a learned single Judge. The Union India and its Officers are the appell- ts. The facts in brief necessary to derstand the dispute involved in the se are as follows :—

The respondent joined the post of ores Officer in the Department of the ological Survey of India on July 30, 75 He was placed on probation for o years. Before the expiry of the pe- d of probation of two years he recei- d a Memo dt. July 25, 1977, from Senior Administrative Officer, zoo- gical Survey of India, informing him at the Government had decided to ex- d his period of probation as Stores Officer by on year more from July 30, 1977. On July 27, 1978, the Dy. Secretary of the Government of India communicated to him an Order of the President of India by which he was informed that the President had terminated his service as a Stores Officer with effect from the afternoon of 29th July, 1978. This communication further stated that the respondent would be entitled to claim a sum equal to the amount of his pay plus allowances in lieu of one month's notice at the same rates at which he was drawing them immediately before the termination of his service. The respondent challenged this Order by filing Writ Petition No. 385 of 1981, before the Calcutta High Court. The main contention raised by him in the Writ Petition was that the Order of termination was bad since a sum equivalent to his pay plus allowances for the notice period was not paid to him along with the notice as required under the terms of his appointment letter. The learned single Judge who heard the Writ Petition declined relief to the respondent and dismissed the Writ Petition. Aggrieved by the said Judgment the respondent filed an appeal. The Division Bench agreed with the respondent's case that the termination order was bad in as much as the full amount of salary and allowance for the notice period was not paid to him at the time of termination of his service and so holding set aside the Judgment of the single Judge and allowed the appeal and quashed the Order of termination and gave liberty to the Government to terminate his service in accordance with the terms of his appointment. Hence the appeal.

2. The main question debated at the Bar by the respective counsel is whether in the case of the respondent it was incumbent upon the Authorities to pay notice salary along with the termination notice or whether it was sufficient if he was informed that he was entitled to such salary on his termination. A resolution of this dispute depends upon consideration of the nature and terms of his appointment. To appreciate this, it is necessary to look into the order of appointment and relevant points of law governing the terms of service.

3. The respondent strongly pleaded that he was appointed to a substantive post since he was placed on probation. If his appointment was purely temporary it was not necessary to place him on probation. The case of the appellant on the other hand was that t
Order of appointment itself indicat
that the respondent was appointed as
temporary hand and that he did n
become a regular hand simply becau
he was put on probation. The termina
ion in this case took place before th
expiry of the extended period of proba
ion which the authority concerned w
entitled to do under the relevant rule

4. We may, in passing indica
as to what was the case of the respo
dent before the High Court. Accordi
to him after he took charge of the po
of Stores Officer in the Department
Zoological Survey of India he foun
certain irregularities in the Stores, spec
fically in the item of rectified spir
According to him he brought such irr
gularities to the notice of his superi
officer. He incurred, as consequence
the displeasure of the officer senior
him which resulted in the Order of te
mination of his service during the peri
of probation Even so we would like t
make it clear that neither before th
learned single Judge nor before the Div
sion Bench did the petitioner plead an
case of mala fides. Nor did he do s
before us.

5 The respondent appeared i
person before us. We find from th
records that he argued his case befor
the High Court also. We felt sympath
etic towards him and therefore suggeste
to the appellants counsel to tell the ap
pellants to accommodate him in som
place last, he, a young man, should was
his life without any employment. Th
learned Counsel for the appellants coul

ot give us any assurance but undertook
o convey our suggestions to the autho-
ities concerned.

6. Now coming to the merits of
e case the Order of appointment of the
spondent is produced as Annexure A.
his shows that he was appointed on a
mporary basis. It is made clear there-
 that though the post is temporary, it
 likely to continue indefinitely, that
e appointment will be liable to be
rminated at any time on one month's
otice given by either side, thus he will
e on probation for a period of two
ears which may be extended, if necess-
ry, and that the other conditions of
ervice will be governed by the orders
nd rules in force from time to time.
lause 2 (ii) of the Order of appoint-
ent is important. It reads :

"The appointing authority, however,
eserves the right of terminating services
f the appointee forthwith or before the
xpiry of stipulate period of notice by
aking payment to him of a sum equiv-
lent to the pay and allowances for the
eriod of notice or the unexpired porti-
n thereof."

7. The Order of termination dt.
7th July, 1978, which is produced as
nnexure B reads as follows :

"In pursuance of the provisions
ontained in para 2 (ii) and (iii) of this
epartment's C.M. No. F. 1-19/73-Sur.
 dt the 9th July, 1975 regarding appo-
tment to the post of Stores Officer in
e Zoological Survey of India, the Pres-
ent of India hereby terminates with
fect from the afternoon of 29th July, 1978, before the expiry of extended period of probation the services of Shri Arun Kumar Roy, Stores Officer, Zoological Survey of India, Calcutta and directs that he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances in lieu of one month of notice at the same rates at which he was drawing them immediately before the termination of his service. By Order and in the name of the president."

8. The learned single Judge who heard the Writ Petition, held that the respondent was a temporary Government servant and that he was governed by Rule 5 (1) of the Central Civil Service (Temporary Service) Rules, 1965, Rule 5 (1) (b) as amended, provided in its proviso that on termination of a temporary Government Servant, one month's notice has to be given and that he shall be entitled to claim a sum equivalent to the pay and allowances for the period of his notice at the same rate at which he was drawing them immediately. The learned single Judge held that the order of termination was valid. The Division Bench disagreeing with the learned single Judge held that the Order of termination was bad since one month's salary and allowances was not paid or tendered to the appellant along with the notice. This is the only question that falls to be decided in this appeal.

9. It is not disputed that the salary and allowances for one month in lieu of notice was not paid or tendered to the appellant simultaneously with the termination of his service. What is the legal consequence? To answer this question

it is necessary to refer to R. 5 (1) (b) of the Central Civil Service (Temporary Service) Rules, 1965. Rule 5 (1) in its amended from reads as follows :

> "5 (1) (a). The services of a temporary Govt. servant who is not in quasi permanent service shall be liable to termination at any time by a notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant;
>
> (b) The period of such notice shall be one month, provided that the services of any such Govt. servant may be terminated forthwith and on such termination, the Govt. servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before the termination of his services, or as the case may be, for the period by which such notice falls short of one month."

10. The proviso to R 5 (1) (b), before it was amended, provided for the simultaneus payment of pay and allowances along with the order of termination. The amendment of the proviso to R. 5 (1) (b) was made in 1971 with retrospective effect from May 1, 1965. It is necessary to note that the appellant was appointed to the post of Stores Officer on July 30, 1975, that is after the amended rules came into force.

11. The learned single Judge relied Upon the amended proviso to R. 5 (1) (b) of the Rules and held that though the pay and allowances were not pai or tendered simultaneously with th service of the order of terminatio the same did not vitiate the termination of the appellant's service. was this finding that was successfull challenged before the Division Benc by the respondent.

12 The Division Bench addresse itself to the question whether the amended provisions of the proviso to R. (1) (b) applied to the case of the respondent or not. In coming to the conclusion that the order of termination wa bad, the Division Bench relied upon th terms contained in the order of appointment and the Notification dt. 26-8 1967 which clarified the operation o R. 5 of the Rules. The Notificatio reads as follows :

> "Under R 5 of the Central Civi Services (Temporary Service) Rules 1965, the services of a temporary Government servant, who is not a quas permanent service, can be terminated at any time by a notice in writing given either by the Government servant who is not in quasi permanent service to the appointing authority or by the appointing authority to the Government Servant. A question has arisen whether this rule should be invoked also in the case of persons appointed on probation where in the appointment letter specific condition regarding termination o service without any notice during or at the end of period of probation (including extended period, if any) has been provided. The position is that the CCS (TS) Rules do not

pecifically exclude probationers or per- ons on probation as such. However, n view of the specific condition re- arding termination of service without ny notice during or at the end of the eriod of probation (including extended eriod, if any), it has been decided in onsultation with the Ministry of Law, hat in case where such a provision has een specifically made in the letter of ppointment it would be desirable to erminate the service of the probationer erson on probation in terms of the etter of appointment and not under R. (1) of the Central Civil Services Temporary Service) Rules, 1965."

13. The Division Bench relied pon this Notification and held that ne said Notification excluded the oper- tion of R. 5 (1) including the proviso nereto in the case of the petitioner hose service was terminated during ne period of probation. The Division ench did not agree with the contenti- n of the Union of India that the Not- ication did not apply to the case of ne appellant Since in its view the erms of appointment clearly indicated nat his services could be terminated nly if the salary and allowances for ne month were either paid or tendered long with the order of termination.

14. We find that the approach nade by the Division Bench is not cor- ect. We could first dispose of the ontention raised by the respondent nat he was not a temporary hand. he order of appointment itself makes clear that he will be on probation for a period of two years which may be extended, if necessary. According to him, a temporary hand is not normally put on probation nor is probation extended in the case of temporary hands. The fact that he was originally put on probation for a period of two years which was extended by one year itself indicates according to him that he is not a temporary hand. This contention need not detain us for long. The appointment order makes it clear that the appointment will be on a temporary basis. The mere fact that he was put on probation does not ipso facto make the appointment any the less temporary and for that reason his extended probation also. Unless the respondent makes out a case based on some rule which requires confirmation to a post on the expiry of the period of probation, he cannot succeed on the mere ground of his being put on probation for a period of two years or by the fact that his probation was extended. He cannot rely upon the first clause in the order of appointment either which states that though the post is temporary it is likely to continue indefinitely. In any case, the order of termination was served on him before the expiry of the extended period of probation. As already indicated R. 5 (1) of the Rules was amended in 1971 with retrospective effect from May 1, 1965. The respondent was appointed on July 30, 1975. The amended rule, therefore, applied in his case. As per this Rule the payment of notice salary was not a

per-requisite for termination. The payment can be made after the order of termination is served on the employee. Reliance by the High Court on the Notification in preference to the rules is also misplaced. Even if strict adherence to the notification is to be made, it has to be noted that it only states that "it would be desirable to terminate the services of probationer......". That is, this notification does not make it obligatory for tender or payment of salary along with the order of termination.

15. A notification has no statutory force It cannot override rules statutorily made governing the conditions of service of the employees. The notification is dt. 26-3-1967 Rule 5 (1) (b) was amended in 1971 with retrospective effect from May 1, 1965. The rule has necessarily to govern the service conditions and not the notification.

16. The effect of R. 5 of the Rules fell to be considered by this Court in two decisions, viz. Senior Superintendent, R. M. S. v. K.V. Gopinath, (1972) 3 SCR 530 : (AIR 1972 SC 1487) and Raj Kumar v. Union of India, (1975) 3 SCR 963. The respondent relied strongly upon the following observations reported in (1972) 3 SCR 530 at p.532:

"......The proviso to sub-rule (b) however gives the Government an additional right in that it gives an option to the Government not to retain the services of the emloyee till the expiry of the period of the notice: if it so chooses to terminate the service at any time it can do so forthwith 'by payment to hi of a sum equivalent to the amount o his pay plus allowances for the period notices at the same rate at which he wa drawing them immediately before th termination of his service, or as the cas may be, for the period by which such notice falls short of one month". A the risk of repetition, we may note tha the operative words of the proviso ar "the services of any such Governmen servant may be terminated forthwith b payment." To put the matter in a nutshell, to be effective the termination o service has to be simultaneous with the payment to the employee of whatever i due to him. We need not pause to consider the question as to what woul be the effect if there was a bonafide mistake as to the amount which is to be paid. The rule does not lend itself to the interpretation that the termination o service becomes effective as soon as the order is served on the Government servant irrespective of the question as to when the payment due to him is to be made. If that was the intention of the framers of the rule, the proviso woul have been differently worded. As has often been said that if 'the precise words use are plain and unambigous, we are bound to construe them in their ordinary sense' 'and not to limit plain words in an Act of Parliament by considerations of polic if it be policy, as to which minds may differ and as to which decisions may vary.'"

This decision was rendered on Feb. 18, 1972. It was the validity of an Order dated Sept. 25, 1968, terminating the respondent therein, that was in question in that case We would ike to observe, with respect, that the amendment brought into R. 5 (1) (b), with effect from May 1, 1965, escaped the notice of the Bench that decided that case, error was subsequently corrected by another Bench of this Court in the decision in Rajkumar v. Union of India, (AIR 1975 SC 1116) by stating :

> "………The effect of this amendment is that on lst May, 1965, as also on 15-6-1971, the date an which the appellant's services were terminated forthwith it was not obligatory to pay to him a sum equivalent to the amount of his pay and allowances for the period of the notice at the rate at which he was drawing them immediately before the terminating of the services or as the case may be for the period by which such notice falls short. The Government servant concerned is only entitled to claim the sums hereinbefore mentioned. Its effect is that the decision of this Court in Gopinath's case (AIR 1972 SC (1487) (supra) is no longer good law. There is no doubt that this rule is a valid rule because it is now well established that rules made uder the proviso to Article 309 of the Constitution are legislative in character retrospectivey..."

17. The question whether the terms embodied in the Order of appointment should govern the service conditions of employees in Government service or the rules governing them is not an open question now. It is now well settled that a Government servant whose appointment though origionates in a contract, acquires a status and thereafter is governed by his service rules and not by the terms of contract. The powers of the Government under Art. 309 fo make rules, to regulate the service conditions of its employees are very wide and unfettered. These powers can be exercised unilaterrlly without the consent of the employees concerned. It will, therefore, be idle to contend that in the case of employees under the Government, the terms of the contract of appointment should prevail over the rules governing their service conditions. The origin of Government service often times is contractual. There is always an offer and acceptance, thus bringing it to being a completed Contract between the Government and its employees. Once appointed, a Government servant acquires a status and thereafter his position is not one governed by contract of appointment Public law governing service conditions steps in to regulate the relationship between the employer and employee. His emoluments and other service conditions are thereafter regulated by the appropriate statutory authority empowered to do so. Such regulation is permissible in law unilaterally without reciprocal consent. This Court made this clear in two Judgments rendered by two Constitution Benches for this Court in Roshan Lal Tandon v. Union of India, (1968) 1 SCR 185 and in State of Jammu and Kashmir v. Triloki Nath Khasa, (1974) 1 SCR 771.

18. Thus it is clear and not open to doubt

that the terms and conditions of the service of an employee under the Goverment who enters service on a contract will, once he is appointed, be governed by the rules governing his service condition It will not be permissible thereafter for him to rely upon the terms of contract which are not in consonance with the rules governing the service.

19. The powers of the Government under Art 309 of of the Constitution to make rules regulating the service conditions of the government employees cannot, in any manner, be fettered by any agreement. The respondent cannot, therefore, succeed either on the terms of the cotract or on the notification on which the High Court has relied upon. Nor can he press into service the rule of estoppel against the Government.

20. Now, we may usefully advert to cl. (v) of para to of the Orders of appointment. This clause reads as follows :

"Other conditions of sevice will be governed by the relevant rules and orders in force from time to time.

21. This clause was inserted by way of abundant caution making it clear that the conditions of service will be regulated by the rules, obtaining from time to time regarding the service in question.

22. The Division Bench of the High Court, in our considered view, erred in relying upon the notification in preference to R. 5(1) (b) and to hold that the Order of termination was wrong and in setting aside the Judgment of the learned single Judge. The Judgment under appeal has, therefore, to be set aside and we do so. The appeal is allowed with no order as to costs:

23. We repeat what we have stated adove, The respondent has been sent out for reasons which we cannot decide in the absence of necessary materials. We suggested to the learned Counsel for the appellants, Mr. Tyagarajan, to provide the respondent with some job. The Counsel, in fairness, agreed to consult his clients. Though our Judgment was ready long ago, we gabe time to the appellants' Counsel here on three occasions, to explore the possibility of providing some job to the respondent. Nothing tangible has happened. We still hope that this young man will be provided with some job in the department.

Appeal allowed.

S. Natarajan
Judge
Supreme Court of India

· OBSERVATION

Expunction of derogatory remarks against witness—Remarks made by High ourt while deciding appeal against conviction—For deciding appeal critical evaluaon of evidence of witness not necessary—Remarks are unjustified and need to be xpunged. (Prevention of Corruption Act (2 of 1947), Ss. 5, 8); (Penal Code (45 of 360), S. 160)—Constitution of India, Art. 136,

OBSERVED BY

V. Balakrishna Eradi and S. Natarajan

Hon'ble Judges Supreme Court of India

IN

Criminal Appeal No. 421 of 1985, decided on 11.4.1986 between Niranjan atnaik, Appellant v. Sashibhusan Kar and another, Respondents.

TEXT

Natarajan, J :— A peculiar feature f this appeal by special leave is that it not an appeal against conviction or gainst acquittal but one preferred by prosecution witness for expunction f several highly derogatory remarks nade against him by a learned Judge of ne High Court of Orissa while allowng Criminal Appeal No. 31 of 1982 on ne file of the High Court of Orissa hri Niranjan Patnaik, the appellant efore us was examined as P.W. 8 in ne trial of T.R. Case No. 6 of 1980 n the file of the Special Judge (Vigiance), Sambalpur against the first resondent. The trial ended in conviction gainst the first respondent and when he appeal filed by him came to be eard by the High Court the appellant ad become a Cabinet Minister in the tate of Orissa. On account of the isparaging remarks made by the Appellant Judge the appellant tendered his resignation and demitted office for maintaining democratic traditions. It is in that background this appeal has come to be preferred.

2. Pursuant to a trap laid by the Vigilance Police on the complaint of the appellant's Manager, Gopi Nath Mohanty (P.W.2) the first respondent was arrested on 26-4-79 for having accepted a bribe of Rs. 2,000/- from Gopi Nath Mohanty. The marked currency notes M. Os. V to XXVI were recovered from the brief case M.O.II of the first respondent prior to the arrest The prosecution case was that the first respondent had been extracting illegal gratification at the rate of Rs. 1,000/- per month during the months of January, February and March, 1979 from Gopi Nath Mohanty but all of a sudden he raised the demand to Rs.

2,000/- per month in April 1979 and this led to Gopi Nath Mohanty laying information (Exhibit 1) before the Superintendent of Police (Vigilance) Acting on the report, a trap was laid on 26-4-79 and after Gopi Nath Mohanty had handed over the marked currency notes the Vigilance party entered the office and recovered the currency notes from the brief case and arrested the first respondent. The first respondent denied having received any illegal gratification but offered no explanation for the presence of the currency notes in his brief case.

3. Eleven witnesses including the appellant who figured as P.W 8 were examined by the prosecution and the first respondent examined three witnesses D.Ws 1 to 3 to substantiate the defence set up by him, viz , that the sum of Rs. 2,000/- had been paid by way of donation for conducting a drama and publishing a souvenir by the Mining Officers' Club and also towards donation for Children's Welfare Fund. The Special Judge accepted the prosecution case and held the first respondent guilty under S. 5 (2) read with S 5(1) (d) of the Prevention of Corruption Act, 1947 (hereinafter referred to as the Act') and S. 161 of the Indian Penal Code (hereinafter referred to as the 'Code'). The Special Judge awarded a sentence of rigorous imprisonment for one year for the conviction under the first charge but did not award any separate sentence for the conviction under S. 161 of the Code.

4. Against the conviction and sentence the first respondent preferre Criminal Appeal No. 31 of 1982 to th High Court of Orissa. A learned Judg of the High Court has allowed th appeal holding that the prosecution ha not proved its case by acceptable evidence and besides, the first respondent' explanation for the possession of th currency notes appeared probable While acquitting the first responden the learned Judge has however, mad several adverse remarks about the conduct of the appellant and about th credibility of his testimony and it i with that part of the judgment we ar now concerned with in this appeal.

5. Mr F. S. Nariman, learne counsel for the appellant argued tha the appellant's limited role in the cas has been unnecessarily and unjustl magnified by the Appellate Judge an further more the legal presumption against the first respondent have bee failed to be applied and these error have led the learned Judge to mak uncalled for caustic comments agains the appellant. Mr Nariman furthe argued that it was not at all necessar for the learned Judge to have dwelt a length on the value of the testimon of the appellant for allowing the appea of the first respondent Mr. Parasaran learned Attorney General participate in the debate pursuant to the notic issued to him and rendered assistanc by placing before us certain earlie decisions laying down the principles t be followed if adverse comments are t be made by Court affecting the characte and reputation of litigants witness an

hird parties. Mr. Jitender Sharma, earned counsel for the first respondent lid not advance any arguments as no listurbance of the acquittal of the first espondent by the Appellate Judge is ought for in the appeal.

6. Having regard to the limited cope of the appeal it is not necessary or us to traverse at length or refer in letail the circumstances under which trap was laid and the first repondent was arrested, Suffice it to ay that Shri Niranjan Patnaik, the ppellant was the licensee of an Iron Mine known as Murgabada Mines at oda Gopi Nath Mohanty (P. W. 2) ad been employed by him as Manager f the mines and he was attending o the affairs of the Mines. The first espondent who was the Senior Mining Officer for Joda had insisted on paynent of Rs. 1,000 to him for allowing nining operations to be carried on peacefully and Gopi Nath Mohanty ad complied with the demand paid Rs. 1,000/- every month during January to March, 1979 Unexpectedly vhen the first respondent raised the lemand to Rs. 2,000/-per month Gopi Nath Mohanty reported the matter to he Superintendent of Police (Vigilance) nd on his instructions a trap was laid n 26-4-1979 and marked currency otes M. Os. V to XXVI were passed n to the first respondent and thereafer the raiding party consisting of the nspector of Police, Vigilance (P. W.10) nd an Executive Magistrate (P. W.9) ecovered the money from the first respondent and arrested him. The first respondent was subjected to a chemical test of having his hands washed with Sodium Carbide solution. The solution turned pink in colour establishing his having handled the marked currency notes treated earlier with Phenolphthalein powder.

7. The appellant was cited as a prosecution witness to speak to the fact that his Manager, Gopi Nath Mohanty (P.W.2) had informed him in March 1979 of his having parted with a sum of Rs. 3,000-to the first respondent by way of bribe during the first three months of 1979 and subsequently about the trap that had been laid for the first respondent. The appellant was not, there fore a material witness in the case and had only been cited to corroborate the testimony of Gopi Nath Mohanty in some measure. As he was not a material or crucial witness the appellant did not evince any interest in the trial of the case. He, therefore, failed to appeal in Court inspite of being summoned to attend the Court on 3-2-1981 and again on 6. 3. 1981. His disregard of the summons from Court led to a third summons being issued on 17. 8. 1981 with a warning that if he failed to appear in Court on 7-9-1981 he would be compelled to attend Court by means of a warrant. It was on such compulsion the appellant appeared in Court on 7-9-81 and gave his testimony. These facts are not controverted by anyone but even so the appellant has filed an affidavit before this Court to substantiate these matters.

8. As earlier stated the first respondent did not deny his receiving the currency notes from Gopi Nath Mohanty or the recovery of the notes from his brief case M.O II He, however, stated that the money was given by way of donation for the welfare projects launched by the Mining Officer's Club of the three defence witness examined by him D. Ws. 1 and 3 were Mines Inspectors while D. W. 2 was a peon attached to the office of the First respon dent. D. Ws. 1 and 3 had however, to admit that the records produced to substantiate the case of donation had been prepared after the first respondent had been arrested and released on bail and the writing were made to the dictation of the first respondent.

9. The trial Judge while assessing the merits of the prosecution case took note of the fact that since the first respondent did not deny the receipt of the money or the seizure of the currency notes from him the burden of proof shifted to him under S 4 (1) of the Act. The Special Judge was of the view that the explanation of the first respondent was belated and therefore, was not believable or acceptable and hence he convicted and sentenced him.

10. The learned Appellate Judge, while dealing with the appeal has failed to take note of S. 8 of the Act and secondly he has given recognition to the rule of presumption contained in S. 4 (1) of the Act only at a belated stage of the judgment. These factors have to a large extent distorted the perspective to be taken in the case. Section 8 of the Act which is extracted below confers immunity from prosecution under S. 165A on persons who figure as witnesses in any proceeding against a public servant for an office under S. 161 or S. 165 or under S. 5(2) or S. 5(3A) of the Act.

Notwithstanding anything contained in any law for the time being in force, a statement made by a person in any proceeding against a public servant for an offence under S. 161 or S. 165 of the Indian Penal Code, or under sub-sec. (2) or sub-sec. (3A) of S. 5 of this Act; that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under S. 165A of the said Code.”

11. Oversight of this provision has made the Appellate Judge conclude that the appellant and Gopi Nath Mohanty (P W 2) are as much guilty as the first respondent in the commission of the offences and as such they stand self-condemned as accomplices to the crime and furthermore the two of them stood exposed to prosecution under S. 165A of the Code.

12. In so for as the rule of presumption under S. 4 (1) is concerned the learned Judge has no doubt recognised in the later portion of the judgment that even though S. (4) (1) would not apply to the charge S. 5 (2) read with S. 5. (1) of the Act it would undoubtedly stand attracted to the charge under S. 161 of the Code. If the learned Judge

ad visualized this position at the utset itself there would not have been y necessity for a microscopic examination of the evidence of the appellant for making sweeping remarks agai- st him Mr. Nariman is, therefore, stified to some extent in contending at even though the Appellant Judge as aware that for the charge under 161 of the Code the first respondent as under an obligation to rebut the gal presumption raised against him, e learned Judge has recognised this osition only after devoting the earlier ortion of the Judgment for decrying e appellant and Gopi Nath Mohanty r having willingly played the role of ribe-givers.

13. Yet another serious infirmity the judgment of the Appellate Judge that the learned Judge has castigated e appellant and Gopi Nath Mohanty r having given bribes of Rs. 1,000/- er month for three months to the rst respondent and decried both of em for putting forth a false case hile at the same time holding that e receipt of bribe of three thousand upees is not the subject-matter of arge and as such the first respondent as under no obligation to disprove e evidence of the appellant and Gopi ath Mohanty on that aspect of the atter. Since the payment of Rs. ,000/-during the earlier months was ot the subject-matter of charge there as no need or necessity for the learned Judge to have critically examined e evidence of the appellant and Gopi ath Mohanty on that aspect of the matter. Conversely if the learned Judge felt the evidence relating to those payments had a material bearing on the case he should not have absolved the first respondent of any obligation to deny those allegations. The error that has crept in because of the different standards adopted can be seen from the conflicting expressions in the judgment extracted as under :

In para 12 of the judgment it is stated as below :–

"The statements made by Mr. Patnaik (P. W 8) and his Manager (P.W 2) with regard to willing participation in the matter of payments of bribe money to the appellant would bring about their own condemnation. These two persons, on their own showing were bribe givers. A bride-giver must be condendemned as much as a bribe-taker. Givers of bribe amounts to public servants are undoubtedly accomplices to crime Being accomplices to the commission of crime because of their statements of payments of bribe money to the appellant for three months, the evidence of these selfcondemened persons, who on their own showing had thrown moral scruples and sense of honesty, if they had any to the winds for which instead of refusing to meet the demand of the appellant, they had willingly paid bribe amounts for three months, would be unworthy of credit without corroboration in material particulars and through reliable sources."

14. However, in para 16 of the judgment it is held that the first respo-

ndent was under no obliatigon to meet the allegations relating to the payment of Rs. 3,000/- to him The relevant portion is worded as follows :

"He had neither been charged under Ss. 5(2) and 5(1) (d) of the Act or under S. 161 of the Code for receiving illegal gratification during the months of January to March, 1979 and had not been asked to meet these allegations. No person can be condemned unheard and for that reason the appellant could not be condemned on the basis of the statement made by P.W.2 and P.W.8 that he had been paid bribe amount for 3 months at the rate of Rs. 1,000/- per month."

15. Nevretheless the learned Judge has again reverted to his original perspective and commented in para 17 as under;

"If as submitted by the defence, the evidence of P.W.s. 2 and 8 with regard to the monthly payment of bribe money at the rate of Rs 1,000/- per month and the increased demand of Rs. 2,000/-is not accepted for the aforesaid reasons, it would expose the utter falsity of the evidence of P.Ws. 2 and 8".

16. Over and above all these, the learned Judge has failed to consider whether a detailed examination of the testimony of the appellant was really called for in order to allow the appeal of the first respondent and set aside his convictions, from what has already been stated it will be apparent that what fell for consideration was whether a sum of Rs. 2,000/-which was admittedly recovered from the first respondent had been received by him by way of bribe or by way of donation. For this limited question the appellant was not a material witness in the case. It was only his Manager, Gopi Nath Mohanty (P.W.2) who claimed to have made the earlier payments to the first respondent as well as to have given a report and participated in the trap proceedings when the first respondent raised the demand of bribe from Rs. 1,000 to Rs. 2,000 per month The assumption of the Appellate Judge that Gopi Nath Mohanty would not have paid any sum of money to the first respondent or given the FIR (Exhibit Pl) against him without securing the prior approval of the appellant is only based on conjecture and not on evidence. The learned Judge has also overlooked the fact that the appellant had not exhibited any anxiety to depose against the first respondent and on the other hand he appeared in Court and gave evidence only after being warned in the summons issued for the third time that a warrant would be issued against him if he failed to respond to the summons. If all these factors had been perceived it would have been clear that there was no need whatever for a minute examination of the appellant's testimony or a critical inquistion of his character and conduct and the judgment of acquittal could have as well been rendered with reference to the failings in the evidence of Gopi Nath Mohanty and the acceptable features in the explanation of the first respondent for his possession of the currency notes. M.Os. V to XXVI series.

17. The defective approach made

the Appellate Court has resulted in
agraphs 9 to 17 being devoted to an
luation and criticism of the appella-
s evidence out of the total 36 paragr-
ns contained in the judgment. In these
agraphs the Appellant Judge has
erely criticised the appellant and has
de harsh remarks which are not sou-
to be expunged. They are extracted
ow:

"These two persons, on their own
owing, were bribe-givers.........Being
complices to the commission of crime
cause of their statements of payments
be moneys to the appellant for three
nths, the evidence of these of two self-
ndemned persons, who, on their own
owing, had thrown moral scruples and
nse of honesty, if they had any, to the
nds for which instead of refusing to
et the demand of the appellant, they
d willingly paid bribe-amounts for
ee months, would be unworthy of
edit without corroboration in material
rticulars and though reliable sour-
s." (Para 12)

"......in which case both P Ws. 2
d 8 would be liable for abetment of
mmission of the said offence by the
pellant ... The acts of P Ws. 2 and 8
uld also be culpable under S; 165-A
the Code.........both P Ws. 2 and 8
re liable to be punished under S.
5-A of the Code. The investigating
ency did not choose to prosecute the
pellant and P.Ws. 2 and 8 for commi-
on of these offences." (Para 13)

"Undoubtedly, P. Ws. 2 and 8 be-
ng to the first category." (Para 14)

"... .these two accomplices,

namely........."(Para 15)

"While, as observed by me, P. Ws. 2 and 8 have condemned themselves as habitual bribe-givers by their own statements and for this, they have to blame none but themselves. "(Para 15)

18. It will be apposite to mention here that the appellant has nowhere stated in his evidence that Gopi Nath Mohanty made the payment of Rs. 3,000 for the three months in question after obtaining his permission or approval. On the other hand he has only deposed that in March 1979 Gopi Nath Monanty had informed him of the payment of these amounts and in order to balance the accounts he had given directions for the amount being shown as impressed cash with the Manager. The Appellate Judge has also proceeded on the assumption that the appellant was holding a public office at the relevant time while in fact the appellant had neither joined the Ministry nor even became a Member of the Legislative Assembly when the first respondent was trapped and arrested.

19. We may now refer to certain earlier decisions where the right of Courts to make free and fearless comments and observations on the one and the corresponding need for maintaining sobriety, moderation and restraint regarding the character, conduct integrity credibility, etc of parties, witnesses and others are concerned.

20 In State of Uttar Pradesh v Mohammad Naim, (1964) 2 SCR 363 it it was held as follows :

“If there is one principle of cardinal importance in the administration of justice, it is this the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by any body, even by this Court. At the same time it is equally necessary that in expressing their opinons Judges and Magistrates must be guided by considerations of justice, fair play and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before Courts of law in cases to be decided by them. it is relevant to consider (a) whether the party whose conduct is in question is before the Court or has an opportunity of explaining or defending himself :(b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judical pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve.”

21. Vide also in R.K. Lakshmanan Vs. A.K. Srinivasan, (1975) 1 SCR 204 : (AIR 1975 SC 1741) wherein this ratio has been referred to.

22. In Panchanan Banerji v Upendra Nath Bhattacharji, AIR 1927 all 193 Sulaman, J held as follows :

“The High Court, as the Supreme Court of revision, must be deemed to have power to see that Courts below do not unjustly and without any lawfu excuse take away the character of a party or of a witness or of a counse before it.”

23. It is, therefore, settled law that harsh or disparaging remarks are not to be made against persons and authorities whose conduct comes into consideration before Crurts of law unless it is really necessary for the decision of the case as an integral part thereof to animadvert on that conduct. We hold that the adverse remarks made against the appellant were neither justified nor called for

24. Having regard to the limited controversy in the appeal to the High Court and the hearsay nature of evidence of the appellant it was not at all necessary for the Appellate Judge to have animadverted on the conduct of the appellant for the purpose of allowing the appeal of the first respondent. Even assuming that a serious evaluation of the evidence of the appellant was really called for in the appeal the remarks of the learned Appellate Judge should be in conformity with the settled practice of Courts of observe sobriety, moderation and reserve. We need only remind that the higher the forum and the greater the powers, the greater the need for restraint and the more mellowed the reproach should be.

S. Natarajan
Judge
Supreme Court of India

25. As we find merit in the cont- tions of the appellant, for the afores- d reasons, we allow the appeal and ect the derogatory remarks made against the appellant set out earlier to stand expunged from the judgment under appeal.

—Appeal allowed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

B. C. Ray,
Judge
Supreme Court of India

OBSERVATION

**Age restriction in promotion—Appointment of Assistant Judges by promo-
n amongst members holding posts of Civil Judges—Provisions are irrational,
bitrary and unreasonable—Gujarat Judicial Service Recruitment Rules (1961)
amended in 1979)—Constitution of India Art. 14, 16, 309, 234.**

OBSERVED BY

A. P. Sen, E S. Venkataramiah
And B, C. Ray,

Hon'ble Judges Supreme Court of India.

IN

Civil Appeal No. 2588 of 1915 decided on 19-3-1986 between Indravadan
. Shah, Appellant v. State of Gujarat and another, Respondent.

TEXT

Ray, J. :—This appeal raises a very
ort though important question as to
e validity and vires of the provisions
Rule 6(4) (i) and Rule 6(4) (iii) (a)
the Gujarat Judicial Service Recru-
ment (Amendment) Rules 1979. The
levant rules are quoted hereinbelow :

(i) Appointment to the post of an
ssistant Judge shall be made by the
overnor in consultation with the High
ourt by promotion of a person from
mongst such persons (comprising of
ose holding the posts of Civil Judges
unior Division) and those in the cad-
of Civil Judges (Senior Division)
hose name have been entered in the
elect List referred to in Clause (ii)
efore they have reached the age of 41
ears and continue in that list on the
ate of appointment;

Provided that no person shall be eligible for such appointment unless he has :-

(a) served for a period of not lees than seven years as a Civil Judge (Junior Division); or

(b) worked on civil side for a period of not less than three years if he belongs to the cadre of Civil Judge (Senior Divison).

(ii) A Select List of members who are considered fit for appointment by promotion to posts of Assistant Judges shall be prepared annually by Government in consultation with the High Court. The selection shall be based on merit, but seniority of the member shall be taken into account as far as possible.

(iii) (a) The name of a candidate entered in the Select List shall be struck out of it on his reaching the age 49 years if during the interval, he is not appointed as an Assistant Judge.

2. The appellant was born on 6-4-1934 and in accordance with the provisions of Gujarat Judicial Service Recruitment Rules 1961 as amended in 1964 to 1969, the appellant being in the cadre of Civil Judge (Senior Division) was considered for selection for inclusion in the select list to be considered for appointment by promotion to the post of Assistant Judge in the years 1980-81 and 1981-82, but he was not found suitable. He was, however, found suitable and his, name appeared in the Selection List prepared for the year 1982-83. His turn did not come up and the Select List lapsed with the expiry of 30-4-1983. On that date as had already completed 48 years, his name was not put on the select List for the following year, namely 1983 84. It is against this non-appearance of his name in the Select List of 1983-84, the appellant assailed the validity of the aforesaid provisions of Rules 6 (4) (i) and 6 (4) (iii) (a) of the Gujarat Judicial Service Recruitment Rules, 1961 as amended up to 1979 on the ground that they were unreasonable, arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution of India by a Writ Petition in the High Court of Gujarat being Civil Appln. No. 2332 of 1984, whereon a rule was issued on December 17, 1984. The said rule after notice to the parties was discharged and it was held that the impugned rules were not arbitrary, unreasonable or irrational and they are not als discriminatory.

3 The Governor of Gujarat frame the Gujarat Judicial Service Recruitmen Rules 1961 under proviso to Article 30 of the Constitution of India read wit Article 234 of the Constitution layin down the mode of recruitment to th Gujarat Judicial Service. These rule as amended up to 1979 provide that th Gujarat Judicial Service shall consist o two branches namely (i) Junior Branc and (ii) Senior Branch The junio branch shall consist of two classes, i. e (a) Class I comprising the cadre of Civi Judges (Senior Division) (b) the Judge of the Court of Small Causes and (c Class II comprising Civil Judges (Junio Division) and Judiclal Magistrates o First Class. In accordance with th amended recruitment Rules 1979 th cadre of Civil Judge (Senior Division shall consist of :—

(a) all Judicial Officers holding on the said date, the post of :—

(i) Civil Judge (Senior Division)

(ii) Chief Judicial Magistrate; and

(iii) Metropolitan Magistrate

(b) Officers recruited to the said cadre under sub-rule (i) of Rule 4.

4 The Senior Branch shall consist o District Judges, principal Judges o Ahmedabad City Civil Court the Chie Metropolitan Magistrate, the Chie Judge of Small Causes Court, Ahmedabad, the Additional Chief Metropolitan Magistrate, Ahmedabad and the Assistant Judges, Rules 6 (4) (i) and 6 (4)

ii)(a) clearly provide that a Civil Judge Senior Division) after completing 48 ears of age will not be eligible for con- ideration for promotion to the post of ssistant Judge and his name appearing 1 select list will be struck out from the elect list on his completion of 48 years, e. on reaching 49 years of age.

5. The only question for consider- tion is whether the provisions of afore- aid Rules 6 (4) (i) and 6 (4) (iii) (a) of he Gujarat Judicial Service Recruit- nent Rules 1961 as amended up to 1979 re invalid being arbitrary, irrational, nreasonable and in contravention of he equality clause envisaged in Articles 4 and 16 of the Constitution of India. To decide properly this question, it is elevant to consider in this connection Rule 6 (2) (i), which provides for appo- ntment to the post of District Judge. The relevant excerpt of the said rule is uoted hereinbleow :

The appointment to the post of a District Judge shall be made by the Governor :—

(a) in consultation with the High Court from amongst the members of the Junior Branch who have ordinarily ser- ved as Assistant Judges; or

(b) on the recommendation of the High Court from amongst members of he Bar who have practised as Advo- cates or Pleaders for not less than seven years in the High Court or Court subor- dinate thereto :—

Provided that a person recruited at he age of not more than 45 years except in the case of a person belonging to a community recognised as Backward by Government for the purpose of recruitment in whose case at the age not more than 48 years shall before he is appointed as a District Judge, be appointed in the first instance to be an Assistant Judge for such period as may, on the recommendation of the High Court, be decided by Government on the merits of his case.

6. It appears that regarding appointment to the posts of District Judges by promotion from amongst members of the Junior Branch who have ordinarily served as an Assistant Judge, there is no limit or bar of age unlike that of the appointment of an Assistant Judge by promotion from the members of Civil Judges (Senior Division) or from members of Civil Judges (Junior Division) or from members of Civil Judges (Junior Division). It is only in the case of direct recruitment from amongst the members of the Bar to the post of District Judges there is an age limit of 45 years which is relaxed to 48 years in the case of recruitment of persons belonging to the community recognised as backward by the Government. It was tried to be justified on behalf of the respondents particularly by the High Court of Gujarat by filing counter that this age restriction for promotion to the post of Assistant Judge was in vogue since 1924 or so even in the erstwhile State of Bombay, though there was no age limit for selection to the post of District Judge from the Bar. It has been further stated that the rationale underlying the age restriction for recruitment to the post of Assis-

tant Judge is that such Assistant Judges should have sufficient number of years left before they reach the age of superannuation, so that their service can be utilized as District Judges. There would be no point in selecting them as Assistant Judges if they have to retire only as Assistant Judges. It has been further stated therein that the present pay scale of Civil Judges (Senior Division) is Rs. 1300-1700/- p.m. and the same is the scale for the post of an Assistant Judge So if an incumbent is taken as an Assistant Judge at an advanced stage he may have to retire only as an Assistant Judge with the result that he will not have any pecuniary gain by being promoted as an Assistant Judge from the post of Civil Judge (Senior Divison). It has been further stated that the law making authority might have considered that a Civil Judge (Senior Division) or Civil Judge (Junior Division) who completes 48 years of age may not be fully equipped with the physical and mental crlibre for that higher post calling for essentially different type of duties, namely conducting Sessions cases, appeals, etc The High Court duly considered this aspect of the case and thereafter the rules in question were framed No rejoinder has, however, been filed on behalf of the State.

7. Similar contentions were made before us by the learned counsel who appeared on behalf of the High Court to support the rationale behind the laying down of the age bar for the purpose or promotion to the post of Assistant Judge in case of persons already in service.

8. The Division Bench of the Gujarat High Court held that this system was in vogue for many decades, even in the bilingual State of Bombay. Though there was no restriction regarding age for selection from the members of the Bar to the post of District Judge, there was age limit for selection and appointment by promotion from the members of Junior Branch to the posts of Assistant Judges. This age restriction provided by the recruiting authorities for different cadres of posts is not repugnant to Article 14 of the Constitution. It was also observed that members of the Bar have got free atmosphere to work and there was enough scope for them to better develop their mental faculty. If in the interest of an important post like that of a District Judge a member of the Bar is to be recruited in order to enthuse fresh blood at that important position of the service cadre, it can be said to be a different class altogether. As such there was no discrimination by introducing age bar in the recruitment rules so far as appointment to the post of Assistant Judges by promotion is concerned. The Class of Assistant Judges and the Class of District Judges for this purpose constitute two different classes.

9 This reasoning given by the High Court is totally unsustainable for the simple reason that if a person holding the post of Civil Judge (Senior Division) who has completed 48 years of age is considered to be not fully equipped with the physical and mental caliber for being appointed to the higher post of

Assistant Judge, then on the same analogy how a member of the Bar will be considered at the age of 48 years to be most suitable for being oppointed to the higher and responsible post of District Judge and such appointees will infuse fresh blood at that important service. On he other hand it is well established that with the coming of age and experience, a Judicial officer becomes more suited and well equipped to perform and discharge he higher duties and responsibilities ttached to the higer posts of Assistant Judge and that of District Judge.

10. The posts of Assistant Judge as well as of District Judge are included in Senior Branch of Gujarat Judicial Service. It is incomprehensible how hose two cadres of Assistant Judges and District Judges can be treated as two different classes altogether, thereby justifying the introduction of age restriction in regard to selection and appointment by promotion to the post of Assistant Judge while doing away with any such sort of age limit or restriction in respect of appointment to the post of a District Judge by promotion from amongst the members of the Junior Branch who have served as Assistant Judges. Articles 14 and 16 of the Constitution ensure that there should not be any discrimination in the matter of appo ntment in service, nor there will be any arbitrariness or unreasonbleness in the rules of recruitment providing for appointment to the service either by promotion or by direct recruitment. There is no nexus to the object sought to be achieved by introducing the age restriction as regards the promotion by appointment to the post of Assistant Judge from amongst the members of the Gujarat Judicial Service (Junior Branch), as provided in Rules 6 (4) (i) and 6 (4) (iii) (a) of the said rules. But in respect of appointment to the higher post of a District Judge by promotion from amongst the members of the Junior Branch who have served as Assistant Judges, on such restriction of age has been provided in Rule 7 (2) (i) (a) and (b) of the said rules. There is obviously no rationale nor any reasonableness for introduction of this age bar in regard to appointment by promotion to the post of an Assistant Judge. That rule, is, therefore, arbitrary and it violates the salutary principles of equality and want of arbitrariness in the matter of public-employment as guaranteed by Articles 14 and 16 of the Constitution. It is pertinent to refer in this connection to the observation of this Court in the case of E P. Royappa v State of Tamil Nadu (1974) 2 SCR 348 at P. 386 which are in the following terms:—

"Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless society envisaged in the Constitution, Art. 16 is only an instance of the application of the concept of equality enshrined in Art. 14. In other words Art. 14 is the genious while Art. 16 is a species, Art. 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Arts 14 and 16 is equality and inhibition against discrimination...........

Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, combined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is inplicit in it that it is unequal both according to political logic and constitutional law ......"

11. Similar observations have been made in the case of Maneka Gandhi v. Union of India (1978) 2 SCR. 621 It has been observed that :—

'Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades. Article 14 like a brooding omnipresence".

12. The reach and ambit of Article 14 has been very succinctly reiterated again by this Court in the case of R.D. Shetty v. International Airport Authority of India (1979) 3 SCR 1014 : (AIR 1979 SC 1628) as follows :—

"It is now well settled that Article 14 strikes at arbitrariness in State action and ensures fairness and equality
of treatment. It requires that Stat
action must not be arbitrary but mu
be based on some rational relevar
principle which is non-discriminator
it must not be guided by any extraneo
or irrelevant considerations, becau
that would be denial of equality. Th
principle of reasonableness and ration
ality which is legally as well as philos
ophically an essential element of equa
ity or non-arbitrariness is projected b
Article 14 and it must characteris
every State action whether it be unde
authority of law or in exercise of e
ecutive power without making of law."

13. We have already stated here
inbefore that the provisions c
Rules 6 (4) (i) read with 6 (4) (ii
(a) are irrational arbitrary and u
reasonable inasmuch as there is n
nexus to the object sought to b
achieved by introducing the age re
striction in regard to appointment o
Assistant Judge by promotion fro
amongst members holding posts o
Civil Judges (Junior Division) an
those in the cadre of Civil Judge
(Senior Division) whose names hav
been entered in the select list. We hav
also held that though the post of Assi
stant Judge as well as the post of Dis
trict Judge belong to the Senior Branc
of Gujarat Judicial Service, yet in th
higher cadre of District Judge no suc
age bar has been introduced. More
over, as has been stated by the lear
ned counsel appearing on behalf o
the High Court of Gujarat that this rul
regarding age restriction which wa
originally introduced in the recruit

nent rules of Judicial Services in the ilingual State of Bombay has subsequntly been deleted and discontinued n the relevant Recruitment Rules of aharashtra Judicial Service, it is urious that this archaic, unreasonable nd irrational rule which is ex facie rbitrary and discriminatory has been llowed to continue in the Gujarat udicial Service Recruitment Rules 1961 s amended up to 1979.

14. We wish to make it clear that ur observations mde hereinbefore hould not be construed to mean that here cannot be any fixation of age of uperannuation in different grades of ther services namely armed forces, air orce and naval force. In such services he fixation of different age of supernnuation in different grades may be nade in public interest in order to nsure excellence in service as well as nerit and effiiciency which to a great xtent depend on physical fitness apart rom merit.

15. In the premises aforesaid, the rovisions of Rule 6 (4) (i) and Rule 6 (4) (iii) (a) of the Gujarat Judicial Service Recruitment (Amended Rules), 1979 are invalid and had as it are unreasonable, irrational, arbitrary and discriminatory, and violating the equality clause envisiaged in Articles 14 and 16 of the Constitution of India.

16. These rules in so far as they impose age restriction in the matter of promotion to the post of Assistant Judge are liable to be quashed and set aside and the judgment of the High Court of Gujarat is also set aside. We direct that the name of this appellant shall be deemed to have been continued in the select list of 1983-84 and his case for appointment to the post of Assistant Judge shall be considered on that basis by the authorities concerned. If he is so appointed to the post of Assistant Judge, he shall get his due seniority and all retiral benefits reckoning his service on that basis The appeal is accordingly allowed. There will be no order as to costs.

Appeal allowed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

OBSERVATION

Removal from service—The word '·consider" in rule implies 'due application of nd'—Rules cast a duty on the appellate authority to consider the relevant tors—Appeal dismissed by the appellate authority—Order dismissing appeal s liable to be set aside—Central Civil Services (Classification, Control and peal) Rules (1965), Rs. 27 (2)—Constitution of India Arts-309 and 311.

OBSERVED BY

A.P. Sen and V. Balakrishna Eradi
Hon'ble Judges Supreme Court of India.

IN

Civil Appeal No. 3165 of 1981 decided on 14-12-1982 between R.P. Bhatt, pellant v. Union of India and others, Respondenents.

TEXT

Order:—The short point involved this appeal by special leave from a lgment and order of the Delhi High ourt dated November 20, 1980 dismiss-g in limine the writ petition filed by e appellant, is whether the Appellate der passed by the Director-General, order Roads Organisation dated ctoder 14, 1980, is in conformity with e requirements of R. 27 (2) of the entral Civil Services (Classification, ontrol and Appeal) Rules, 1965 Rules' for short) which have been ade applicable to the personnel of the order Road Organisation.

2. The facts are that the appell-t was appointed as Supervisor (Barr-ks and Stores) Grade I attached to 60 oad Construction Company, General eserve Engineering Force on probat-n for a period of two years by an order dated July 7, 1976. Before the expiry of the probationary period, the Chief Engineer (Project) Dantak by an order dated June 24, 1978, terminated the services of the appellant. The order of termination however could not be served on the appellant as he absented himself without leve. Thereupon the Officer Commanding by a movement order dated June 27, 1978 transferred the appellant to 19 Border Roads Task Force. On July 1, 1978 the Officer Commanding forwarded the order of termination issued by the Chief Engineer, but on representation by the appellant, the Director-General, Border Roads Organisation by order dated November 17, 1978 cancelled the order of termination presumably on a misapprehension that the period of probation having expired, no order of termination could be made. He however directed

the taking of disciplinary action against the appellant as a deserter since he had absconded from service to evade the service of the order of termination. After a regular departmental inquiry, the appellant was served with a show cause notice under Art 311 (2) of the Constitution and after considering the representation made by him, the Chief Engineer (Project), Dantak imposed on the appellant the punishment of removal from service in exercise of the powers conferred by R. 12 read with R 11 (viii) of the Rules with effect from June 10. 1980. Against the order of removal, the appellant preferred an appeal under R. 23 of the Rules before the Director-General, Border Roads Organisation. The Director-General by the impugned order dismissed the appeal observing :

"After thorough examination of the facts brought out in the appeal, the DGBR is of the opinion that the punishment imposed by the CE (P) Dantak vide his Order No. 10527/762/EIR dated 24 June 78 was just and in accordance to the Rules applicable. He has accordingly rejected the appeal."

3. Having heard the parties, we are satisfied that in disposing of the appeal the Director-General has not applied his mind to the requirements of R. 27 (2) of the Rules. The relevant provisions of which read as follows :

"27(2). In the case of an appeal against an order imposing any of the penalties specified in Rule 11 or enhancing any penalty imposed under the
said Rules, the appellate authority sh
Consider :

(a) Whether the procedure la
down in these rules has deen compli
with and if not, whether such non-c
mpliance has resulted in the violati
of any provisions of the Constitution
India or in the failure of justice;

(b) whether the findings of the
sciplinary authority are warranted
the evidence on the record; and

(c) whether the penalty or
enhanced penalty imposed is adequa
inadequate or severe;
and pass orders-

(i) confirming, enhancing, redu
ing, or setting aside the penalty; or

(ii) remitting the case to the a
thority which imposed or enhanced t
penalty or to any other authori
with such direction as it may deem
in the circumstances of the case."

4. The word 'consider' in R.
(2) implies 'due application of min
It is clear upon the terms of R. 27(
that the Aappellate authority is requir
to consider (1) whether the procedu
laid down in the Rules has been co
plied with; and if not, whether su
non-compliance has resulted in
olation of any provisions of the Co
stitution or in failure of justice; (
whether the findings of the disciplina
authoirty are warranted by the evid
nce on record; and (3) whether the p
nalty imposed is adequate; and ther
after pass orders confirming, enhan
ing ete. the penalty, or may rem

back the case to the authority which imposed the same. Rule 27 (2) casts a duty on the appellate authority to consider the relevant factors set forth in Cls. (a), (b) and (c) thereof.

5. There is no indication in the impugned order that the Director-General was satisfied as to whether the procedure laid down in the Rules had been complied with; and if not, whether such non-compliance had resulted in violation of any of the provisions of the Constitution or in failure of justice. We regret to find that the Director-General has also not given any finding on the crucial question as to whether the findings of the disciplinary authority were warranted by the evidence on record. It seems that he only applied his mind to the requirement of Cl. (c) of R. 27(2). viz. whether the penalty imposed was adequate or justified in the facts and circumstances of the present case. There being non-compliance with the requirements of R. 27(2) of the Rules, the impugned order passed by the Director-General is liable to be set aside.

6. It is not the requirement of Art 311(2) of the Constitution of India or of the Rules of natural justice that in every case the appellate authority should in its order state its own reasons except where the appellate authority disgrees with the findings of the disciplinary authority. In State of Madras v. A.R. Srinivasan, AIR 1966 SC 1827 a Constitution Bench repelled the contention that the state Government's order compulsorily retiring the delinquent from service was bad as it did not give reasons for accepting the findings of the inquiring tribunal and observed as follows :

> "Mr. Setalvad for the respondent attempted to argue that the impugned order gives no reasons why the appellant accepted the findings of the Tribunal Disciplinary proceedings taken against the respondent, says Mr. Setalvad, are in the nature of quasi-judicial proceedings and when the appellant passed the impugned order against the respondent, it was acting in a quasi-judicial character. That being so, the appellant should have indicated some reasons as to why it accepted the findings of the Tribunal; and since no reasons are given, the order should be struk down on that ground alone".
>
> We are not prepared to accept this argument. In dealing with the question as to whether it is obligatory on the State Government to give reasons in support of the order imposing a penalty on the delinquent officer, we cannot overlook the fact that the disciplinary proceedings against such a definquent officer begin with an enquiry conducted by an officer appointed in that behalf That enquiry is followed by a report and the Public Service Commission is consulted where necessary. Having regard to the material which is thus made available to the State Government and which is made available to the delinquent officer also, it seems to us somewhat unreasonable to suggest that the State Government must record its reasons why it

accepts the findings of the Tribunal. It is conceivable that if the State Government does not accept the findings of the Tribunal which may be in favour of the delinquent officer and proposes to impose a penalty on the delinquent officer, it should give reasons why it differs from the conclusions of the Tribunal, though even in such a case, it is not necessry that the reasons should be detailed or elaborate. But where the State Government agrees with the findings of the Tribunal which are against the delinquent officer, we do not think as a matter of law, it could be said that the State Government cannot impose the penalty against the delinquent officer in accordance with the findings of the Tribunal unless it gives reasons to show why the said findings were accepted by it. The proceedings are, no doubt, quasi-judicial; but having regard to the manner in which these enquiries are conducted, we do not think an obligations can be imposed on the State Government to record reasons in every case.

7. In Som Datt Datta v. Union of India (1969) 2 SCR 177 : (AIR 1969 SC 414), a Constitution Bench of this Court rejected the contention that the order of the Chief of the Army Staff confirming the proceedings of the Court Martial under S. 164 of the Army Act and the order of the Central Government dismissing the appeal of the delinquent under S. 165 of the Army Ac were illegal and ultra vires as they dic not give reasons in support of the orders, and summed up the legal positior as follows :

"Apart from any requiremen imposed by the statute or statutory rule either expreessly or by necessary implication, there is nc legal obligation that the statutory tribunal should give reasons for its decision. There is also no general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision."

8. To the same effect is the decision in Tara Chand Khatri v Municipal Corpn, of Delhi, AIR 1977 SC 567.

9. Accordingly, the appeal mus succeed and is allowed. The impugned order passed by the Director-General, Border Roads Organization is set aside and he is directed to dispose of the appeal afresh after applying his mind to the requirements of R. 27(2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, with advertence to the points raised by the appellant in his petition of leave.

10. There shall be no order as to costs.

Appeal allowed.

E. S. Venkataramiha
Judge
Supreme Court of India

OBSERVATION

(A) Subordinate Civil Courts Ministerial Establishment Rules (1947). Rr 5,
nd Appendix II—Rules for the Recruitment of Ministerial Staff to the Subordin-
Offices (1950), Rr. 3, 5, 6, 7—Recruitment of ministerial staff—Provision for,
le in 1947 Rules—Promulgation of 1950 Rules in supersession of existing Rules
0 Rules in supersession of existing Rules—1950 Rules only making some modifi-
on in syllabus for examination—Entire 1947 Rules cannot be said to be repealed
mplication by 1950 Rules. (General Clauses Act (10 of 1897) S 6)

(B) Subordinate Civil Courts Ministerial Establishment Rules (1947), Rr. 5, 11
Appendix II—Rules for the Recruitment of Ministerial Staff to the Subordinate
ces—(1950), Rr. 3, 5, 6, 7 Subordinate Civil Courts Ministerial Establishment
nendment) Rules (1969), Rr. 2, 3—Recruitment of ministerial staff—Competitive
for, held in 1981—Test held in accordance with 1950 Rules is proper—Amendment
es of 1969 do not effectively substitute 1950 rules 1987—All CJ) 541, Reversed
neral Clause Act (10 of 1987) S. 6); (Interpretation of Statutes—Implied repeal).

(C) Constitution of India, Art 226—Writ petition—Grant of relief—Petition
llenging validity of competitive exam as not held as per law—Petitioner appearing
examination without protest—Petition filed on realisation that he would not succe-
-Relief ought not to degranted to petitioner 1985 All CJ 541, Reversed. (Para 23)

OBSERVED BY

A P. Sen, E. S. Venkatramiah and B. C. Ray,
Hon'ble Chief Justice and Judges Supreme Court of India.

IN

Civil Appeal No. 2999 of 1985, decided on 18-3-1966 between Om Prakash
kla, Appellant v Akhilesh Kumar Shukla and others, Respondents.

TEXT

Venkatramiah, J :—This appeal
special leave is filed against the
gment and order of the High Court
Allahabad dated April 12, 1985 in
it Petition No. 3961 of 1982 by
ich the High Court of Allahabad
ashed the results of the competitive
mination held by the District Judge
of Kanpur in September, 1981 for selecting candidates for appointment to the vacancies in Grade III of the ministerial staff in the Subordinate Courts in the District of Kanpur.

9. Before the commencement of the Constitution, recruitment to the ministerial establishment in the Subord-

inate Civil Courts of the United Provinces was regulated by the Subordinate Civil Courts Ministerial Establishment Rules'). The said Rules were promulgated by the Governor of the United Provinces on August 1, 1947. The expression 'Ministerial Establishment' was defined by R. 2 (c) of the 1947 Rules as the staff of the Subordinate Civil Courts consisting of ministerial servants as defined in Fundamental Rule (17), Financial Handbook, Vol. II, Part II. According to the definition given in R. 2 (e) of the 1947 Rules the expression 'Subordinate Civil Courts' included the Courts of District and Sessions Judge, Additional District and Sessions, Judge Civil and sessions udges, Civil Judges, Additional Civil and Sessions Judges, Civil Judges Additional Civil Judges, Munsifs, Additional Munsifs, and Courts of Small Causes subordinate to the High Court of Judicature at Allahabad or the Chief Court of Oudh at Lucknow. R. 5 of the 1947 Rules prescribed the academic qualifications which a person should possess for being a candidate to a post in the ministerial establishment. it reads as follows :

"5. Academic qualifications-No person who is not already on the staff attached to a subordinate civil court shall be appointed to a post in the ministerial establishment unless;

(a) he has passed at least the High School examination conducted by the Board of High School and Intermediate Education, United Provinces or any other examination which has been may be declared by the Governor to equivalent thereto ;

(b) he possesses a thorough kno edge both of Urdu and Hindi ;

(c) he possesses in the case of candidate for the post of stenograph a diploma or certificate from a Unive ity or a recognised shorthand a typewriting institution, showing that possesses a speed of at least 100 wor in shorthand and 35 words per minu in typewriting."

3. Rule 11 of the 1947 Rules whi is relevant for the purposes of this ca reads as follows :—

"11. The recruitment shall based on the results of a competiti examination, and an interview by t District Judge at the headquarters the judgeship the examination and interview shall be held in the mann laid down in Appendix II.

Provided that the District Jud may delegate any one or more of t functions other than the function intarviewing the candidates to a seni civil judge or senior munsif in respe of the examination held under th rule."

4. Appendix II of the 1947 Rul which contains the details regardi the manner in which the competiti examination was to be held reads thus

"APPENDIX II
(VIDE RULE II

The examination shall be in thre parts.

(1) Compulsory subject 350 marks Tot

(2) Optional subjects 50 marks 500
(3) Interview 100 marks

Compulsory subjects shall be—
(a) Translation from English into Urdu
(b) Translation from English into Hindi
-Total
(c) Translation from Urdu into English
200
(b) Translation from Hindi into English
(e) Precis writing 50
(f) Dictation 100
Optional subjects—
Shorthand and typewriting 50

In the optional subjects no marks shall be awarded to any candidate who loes not reach the minimum standard equired in the note to R. 14.

Any clerk who is already on the establishment and is not qualified as a tenographer may sit for the examination in typewriting and shorthand alone and will be eligible for appointment as tenographer if he qualifies "

5. By virtue of the provisions of Article 313 and of Article 372 of the Constitution, the 1947 Rules continued o be in force even after the commencement of the Constitution. But on July 5, 1950 the Governor of Uttar Pradesh promulgated rules for the recruitment of ministerial staff to the subordinate offices in the State of Uttar Pradesh including the offices of subordinate Civil Courts in exercise of the powers conferred on him by the proviso to Article 309 of the Constitution of India in supersession of all existing rules and orders on the subject. These rules were called the 'Rules for the Recruitment of Ministerial Staff to the 'Subordinate Offices, 1950' (hereinafter referred to as the 1950 Rules'). Rule 2 of the 1950 Rules defined the term 'Subordinate Office' as including all offices under the control of the Governor of Uttar Pradesh other than those of the Secretariat, the State Legislature, the High Court and the Public Service Commission, Rule 3 of the 1950 Rules provided that the recruitment to the lowest grade of the ministerial staff in a subordinate office shall be made on the basis of a competitive test. Rules 5, 6 and 7 of the 1950 Rules read as follows :—

"5. Tests to be held annually— The competitive tests shall be held at least once a year and at the time specified in the Schedule by each head of a subordinate office for posts not requiring technical knowledge, e.g. stenography :

Provided that if the strength of any office does not warrant annual recruitment, or recruitment in a particular year, a competitive test shall be held whenever it becomes necessary to recruit a ministerial servant to the office.

6. Subjects of the tests— (1) The competitive tests shall comprise a written test as well as an oral test.

(2) The subjects of the tests and the maximum marks on each subject shall be as follows :

Subjects	Marks
Oral	
(i) Personality	25
(ii) General Knowledge and suitability for the particular post	25
Written	
(i) Simple drafting	50
(ii) Essay and Precis writing	50
(iii) Hindi	50
Optional	
(i) Typewriting and shorthand	50
(ii) English	50

Note :-- A candidate must take one of the two optional subjects and may take both.

7. Selection of candidates – (1) On the results of the test the head of the subordinate office shall select a number of candidates sufficient to fill the number of vacancies as ascertained in R. 3 and offer to them appointments as and when the vacancies occur, according to the order of merit disclosed at the test.

(2) No one who has not been selected in accordance with sub-rule (1) shall be appointed to any vacancy unless the list of selected candidates is exhausted.

(3) Casual vacancies may be filled up by appointing persons who have not taken the test but their further retention shall depend on their taking the next test and being selected in it.

6. In the Schedule attached to the 1950 Rules it was provided that for the offices of the subordinate Civil Courts the competitive examination should be held in August second week every year. The relevant entry in that Schedule reads as follows : –

> "Judicial (A) Department
>
> (1) Offices of Subordinate Civil Courts–August second week"

7. The 1950 Rules did not however, expressly say that the 1947 Rules had been superseded by these Rules. But it is significant to note that the 1950 Rules clearly stated that the Governor had framed them in supersession of all existing rules and orders on the subject for recruitment to the ministerial establishment of subordinate offices under his control. The clear effect of the 1950 Rules therefore was that the 1947 Rules stood superseded by the 1950 rules as regards the subjects prescribed for the test and the manner of the examination to be held for the purpose of selecting candidates for the ministerial staff in the Civil Courts of the State of Uttar Pradesh. To be precise, Rr. 9 to 12 and Appendix II of the 1947 Rules were superseded. The two reasons in support of the above view are : (i) that in the definition of the expression 'Subordinate Office' only the offices of the Secretariat, the State Legislature, the High Court and the Public Service Commission stood excluded and (ii) the offices of the Subordinate Civil Courts were included in the Schedule to those Rules. On its administrative side the High Court also understood that the 1950 Rules were applicable insofar as recruitment of the ministerial staff in

e Civil Courts was concerned. This s evident from a letter written by Shri M.P. Singh, Joint Registrar of the High Court of Ailahabad to all the district udges in the State of Uttar Pradesh n February 12, 1973 which is as under:

rom

M.P. Singh, B.A., LL.B.
Joint Registrar,
High Court of Judicature at
Allahabad.

o

All the District Judges,
Subordinate to the High Court
of Judicature at Allahabad.

CIRCULAR LETTER

No. 14/ve-4 Dated Allahabad
February 12, 1973

ubject : – Recruitment to the establishnent of the Subordinate Civil Courts

ir,

It has been brought to the notice f the court that many Distrcit Judges ace a lot of difficulties at the instance f Employment Exchange in making ecruitments to their establishments. roadly speaking the difficulties pointed ut by them are as under :

1. Quite often the District Judges, n the list of approved candidates aving exhausted, have to recruit candiates directly without subjecting them o a regular test prescribed under the ules for filling up casual vacancies and or meeting the requirements of newly reated additional courts at short notice nd such candidates continue in the mployment of the cibil courts for a onsiderable time, but when a test is held for recruitment, the Employment exchange either refuses to sponsor the names of those candidates or withholds their applications for one reason or the other and consequently such candidates are prevented from taking up the test.

2. Some times the Employment Exchange, while forwarding the applications of candidates, withholding applications of such candidates who appear to be deserving and suitable to the District Judges without assigning any reason and this compel the District Judges to recruit candidates only from amongst the candidates whose applications are forwarded by the Employment Exchange.

In order to obviate the difficulties, the court has examined the whole scheme and the rules and within frame work of the existing rules and Government orders on the subject, the following procedure is laid down for our guidance :—

While following the procedure laid down in existing rules, published under Government Notification No O-111/XI -8-50 dated July 11, 1950 (which was adopted in supresession of Rr. 9 to 12 of the U.P. Subordinate Civil Courts Ministerial Establishment Rules 1947) and amplified in G.O. No O-2248/II-8-III-1950 dated August 30, 1950 the District Judge should in addition himself advertise his requirement under intimation to the Employment Exchange and while doing so he should take care to make it clear that all applications are to be addressed to him and routed through the Employment Exchange. The District Judge should further require that candidates should, send advance copies of their applications direct to the District Judge which would go to ascertain whether all applications have been forwarded to him by the Employment Exchange or not. However, if on receiving the applications from the Employment Exchange, it is found that applications of certain suitable candidates have been withheld by the Employment Exchange, the District Judge may in his discretion, permit such candidates to take the test as contemplated in paragraph 7 of the G.O. dated August 30, 1950 referred to earlier.

In the case of candidates who are appointed to fill up casual vacancies without appearing in the regular test prescribed under the rules and are already working on the staff of the Civil Court concerned, they should be treated as departmental candidates and should be allowed to take the test without any reference to the Employment Exchange in order to enable them to qualify for regular appointment.

Yours faithfully,
Sd/-
M.P. Singh
Joint Regisrtar

8 From the above letter it is clear that the High Court understood that Rr. 9 to 12 of the 1947 Rules including R 11 whicn prescribed the manner of examination (and Appendix II to the 1947. Rules which prescribed details regarding the subjects in the examination had to be held) had bee superseded by the 1950 Rules.

9. In the meanwhile in exercise (his powers under proviso to Articl 309 of the Constitution, the Governc had promulgated by the Subordinat Civil Courts Ministerial Establishmer (Amendment) Rulcs, 1969 on Septem ber 20, 1969 amending the 1947 Rule (hereinafter referred to as 'the 196 Amending Rules'). The 1969 Amend ing Rules read as follows :

"No. 49 (1)/69 Nyaya (Ka-2)
September 20, 196

In exercise of the powers unde proviso to the Article 309 of the Consti tution, the Governor is pleased to mak the following rules with a view to am end the Subordinate Civil Court Min sterial Establishment Rules, 1947 pub lished with Government notificato No 2494/VII-612-40 dated August, 1947.

RULES

1. Short title and commencement (i) These Ruls may be called th Subordinate Civil Courts Ministeria Establishment (Amendment) Rules, 196 (III) they shall come into force witl effect from the date of their publicatior in the Gazette.

2. Amendment of R. 5: In th Subordinate Civil Courts Ministeria Establishment Rules, 1947 (hereinafte referred to as the said rules); for th rules as set out in Column 1, the rule a set out in column 4 shall be substituted

(See table on next page)

10 The existence of thess Amend

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ng Rules of 1969 was not taken note of
y the High Court when the letter of the
Joint Registrar dated February 12, 1973
vas addressed to all the District Judges.
t appears from the said letter that the
High Court was following the 1950 Ru-
es even after the promulgation of the
969 Amending Rules for purposes of
olding the competitive examination for
ecruitment to be ministerial staff in the
Civil Courts. Then came the Subordi-
ate Offices Ministerial Staff (Direct Re-
ruitment) Rules, 1975 (hereinafter refe-
red to as the 1975 Rules') promulgated
y the Governor under the proviso to
Article 309 of the Constitution. The said
Rules were promulgated in supersession of all existing rules and orders on the subject. R 2 of the 1975 Rules which dealt with their application read as follows :

"2. Application of these rules. (1) These rules shall govern recruitment to all the ministerial posts of the lowest grade, other than the posts of stenographer (which are required to be filled by direct recruitment and which are outside the purview of the publice Service Commission) in all subordinate offices under the control of the Government but excluding the Secretariat, the offices of State Legislature, Lokayukt, Public service.

Column 1	Column 4
5. Academic qualifications: – No erson who is not already on the staff ttached to a subordinate civil court hall be appointed to a post in the ninisterial establishment unless:—	Academic qualification : No person who is not already on the staff attached to a subordinate Civil Court shall be appointed to a post in the ministerial establishment unless:—
(a) he has passed at least the High chool Examination conducted by the oard of High School and Intermediate ducation United Provinces or any ther examination which has been or nay be declared by the Governor to be quivalent thereto ;	(a) he has passed at least the Intermediate Examination conducted by the Board of High School and Intermediate Education, U. P. or any other examination which has been or may be declared by the Governor to be the equivalent thereto;
(b) he possesses a thorough know-edge both of Urdu and Hindi;	(b) he possesses a thorough knowledge both of Urdu and Hindi;
(c) he possesses in the case of a andidate for the post of Stenographer, diploma or certificate from a Univer-ity of a recognised Shorthand and ypewriting Institution, showing that he ossesses a speed of at least 100 words er minute in Shorthand and 35 words er minute in typewriting	(c) he possesses in the case of a candidate for the post of Stenographer a diploma or certificate from a University or a recognised Shorthand and typewriting Institution showing that he possesses a speed of at least 100 words per minute in typewriting (sic).

E.S. Venkatramiah
Judge
Supreme Court of India

3, AMENDMENT OF APPENDIX II

Coumn I

Existing Appendix II	Marks
The examination shall be in three parts:	
1. Compulsory subjects	350
2. Optional subjects	50
3 Interview	100
Total	500

Compulsory subjects shall be

(a) Translation from English to Urdu	50
(b) Translation from English to Hindi	
(c) Translation from Urdu to English	50
(d) Translation from Hindi to English	50
(e) Precis writing	50
(f) Dictation	100

OPTIONAL SUBJECTS :

Shorthand & Typewriting 150

In the optional subject no marks shall be awarded to any candidate who does not reach the minimum standard required in the note rule 14

Any clerk who is alredy on the Establishment, and is not qualified as a stenographer may sit for the examination in typewriting and shorthand alone and will be eligible for appointment as stenographer if he qualifies.

5 In the said Rules for the Appendix as set out in column 1 the Appendix as set in column 2 shall be substituted.

Column II

Appendix as hereby substituted	Mark
The Examination shall be in three parts :	
1. Compulsory subjects	35
2. Optional subjects	5
3. Interview	10
Total	50

Compulsory subjects shall be

(a) Translation from English to Hindi	5
(b) Translation from Hindi to English	5
(c) Hindi Drafting (Added)	5
(d) Hindi Precis writing	5
(e) English Drafting (Added)	5
(f) Dictation	1

OPTIONAL SUBJECTS :

Shorthand & Typewriting 5

In the optional subject no marks shall be awarded to any candidate who does not reach the minimum standard required in the note to rule 14.

Any clerk who is already on the Estab-lishment & is not qualified as a Steno grapher may sit for the examination i typewriting and shorthand alone an will be eligible for appointment a Stenographer if he qualifies " nmission, Uttar Pradesh, High rt, the Subordinate Courts under control and superintendence of the h Court, the Advocate General, ar Pradesh and of the establishments er the control of the Advocate eral,"

11. From R.2 of the 1975 Rules ch is set out above, it is clear that said Rules were not made applica- to the Secretariat, the offices of the e Legislature, Lokayukta, public vice Commission, High Court, the ordinate Courts under the Control Superintendence of the High Court all the establishments under the trol of the Advocate General. The 5 Rules prescribed the qualifications the pattern of a competitive ex- nation for purposes of recruitment ubstitution of what had been pre- bed by the 1950 Rules in respect ubordinate offices to which the 1975 es applied. Sub-rule (1) of R. 20 of 1975 Rules expressly provided s :

"20. Repeal and validation :—(1) e Rules for the recruitment of mini- ial staff in the Subordinate offices lished under notification No. O- 9/IU-8-50, dated July 11, 1950 as ended from time to time, shall be, and deemed to have been repealed with ct from June, 5, 1974".

12. It was after the promulgation he 1975 Rules that the competitive mination, with which we are con- ned, was held by the District Judge Kanpur. The said examination was held in September 1981 and its results were announced on July 25, 1983. Respondent No. 1 and many others appeared in the said examination. The competitive examination was, however, held in accordance with the 1950 Rules. The 1969 Amending Rules were not, however, followed. Respondent No. 1 who had appeared for the competitive examination was not successful. Aggrieved by the result of the examination he filed the writ petition before the High Court of Allahabad, out of which this appeal arises. His principal contention before the High Court was that the competitive examination which had been held in accordance with the 1950 Rules was an unauthorised one and that it should have been held in accordance with the 1947 Rules as amended by the 1969 Amending Rules The High Court held that it was evident that the intention of promulgating the 1950 Rules was only to prescribe a syllabus different from what had been prescribed in the 1947 Rules but the modification made by the 1950 Rules did not, however, modify the rest of the 1947 Rules. The High Court was of the opinion that "therefore, it follows that the 1950 Rules being later in time superseded 1947 Rules to the extent of its inconsistency. After the enforcement of 1950 Rules competitive tests for holding selection for appointment to the Ministerial Establishment of Subordinate Courts was required to be held in accordance with the syllabus of 1950 Rules and not in accordance with Appendix II of 1947 Rules. In other respects the 1947 Rules continued to be effective."

13. The High Court then found that on the promulgation of the 1969 Amending Rules the syllabus by the 1950 Rules could not be followed. The High Court observed on this question as follows:

"The question, however, arises what was the effect of Subordinate Civil Courts Ministerial Establisment (Amendment) Rules, 1969. As noted earlier, the Rules of 1969 were framed by the Governor, amending Appendix II of 1947 Rules. The notification dated September 20, 1969, under which the Rules were enforced, does not contain any reference to 1950 Rules It appears that while amending the 1947 Rules, the Governor failed to notice that Appendix II of 1947 Rules had already been superseded by Rule 6 of 1950 Rules. However, it is evident that the intention was to prescribe different syllabus than that presribed by 1950 Rules. There is no doubt that by the 1969 Rules, the Governor intended to lay down a syllabus for holding competitive examination for selection and appointment to the ministerial establishment of Subordinate Courts which was quite different from the syllabus prescribed by R. 6 of 1950 Rules as well as Appendix II of 1947 Rules. The 1969 Rules were also framed by the Governor in respect of the same subject matter as laid down R. 5 of 1950 Rules. Since 1969 Rules were framed later in time by the same authority on the same subject, it must be held that the syllabus prescribed by the Amending Rules superseded the earlier rules on the subject.

14. The High Court gave one more reason for holding that the 1950 Rules were no longer in force in the year 1981. The High Court was of the view that the 1950 Rules having been repealed by R. 20 of the 1975 Rules they were no longer effective from June 5, 1974. It observed thus:

"The 1969 Rules, no doubt purported to amend Rule 5 and Appendix II of 1947 Rules. The language of the Rules of 1969 indicates that apart from the rules being in the nature of an amendment, the Governor intended to lay down specific rules precribing educational qualifications and syllabus for holding the examination for recruitment to the Ministerial Staff of the Subordinate Courts. Even if the 1969 Rules could not effective during the period the 1950 Rules were in force, the same would be fully effective after June 5, 1974, on the repeal of 1950 Rules. We, therefore, hold that in any event after June 5, 1974 recruitment to the ministerial staff of the Subordinate Courts could be held only in accordance with 1947 Rules read with 1969 Rules and not in accordance with 1950 Rules.

15. The High Court was of the view that since within the judgeship of Kanpur the examination had not been held in accordance with the syllabus prescribed by the 1947 Rules as amended by the 1969 Amending Rules all those who were successful and selected for appointment had no legal right to be appointed. It accordingly quashed the exmination held in 1981 by the District Judge of Kanpur, the results of

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E. S. Venkatramiah
Judge
Supreme Court of India

ich had been announced in 1983 by judgment dated April 12, 1985. e High Court clarified that all the ndidates who had applied for the 1981 mination were, however entitled to pear for the fresh examination to be d by the District Judge of Kanpur. further observed that in the other stricts of Uttar pradesh where examinations had been held under the 1950 les and which had not been challe-ed the selection and appointment de in pursuance thereof should be ated as valid and would not be re-ered invalid on the ground that any her view would cause great hardsh- 'which will not be in the public erest'. The result of the judgment s that only those who had been ected or appointed on the basis of competitive examination held by District Judge, Kanpur lost their pointments or the right to be appnted but all other candidates who d been selected on the basis of ex-inations held in accordance with the 50 Rules in the rest of the State of tar Pradesh containued in their sts.

16 Aggrieved by the judgment the High Court, the appellant who s one of the selected candidates in Kanpur examination, has filed this peal by special leave.

17. In this case the deficiencies the drafting of the rules and the advertence on the part of the High urt in complying with them pose me difficulty in arriving at a just ution. There is no dispute that the 1947 Rules made appropriate provisions regarding the recruitment of candidates to the posts in the ministerial establishment in the Subordinate Courts in the former United Provinces and they continued to be in force till July 11, 1950. On July 11, 1950 the 1950 Rules were promulgation. They were applicable not merely to the ministerial establishments in Civil Courts but to the ministerial establishments in several other offices. They were promulgated in supersession of all existing rules and orders on the subject. They prescribed that recruitment to the ministerial staff in a subordinate office to which the said rule were applicable should be made on the basis of a competitve test and also provided for the made of calculation of vacancies, the period during which competitive examinations should be held the subjects for the test and the marks assigned to each of them and the method of selection of successful candidates. They also provided that appointments to higher posts in the ministerial staff of those offices should be mads by promotion Rules 9 to 12 of the 1947 Rules and Appendix II to it which dealt with above topies thus stood superseded. The other parts of the 1947 Rules which dealt with the nationality, domicile and residence of the candidates, their academic qualifiications, character and physical fitness, the appointing authority, probation and confirmation, seniority, punishment; rate of pay, transfers and regulatiens of conditions of service remained itnact since the 1950 Rules did

not make any provision asregards these topies. Hence we do not agree with the argument urged on behalf of the appellant that the 1947 Rules stood superseded in their entirety by the 1950 Rules relying upon the opening words of the 1950 Rules which read thus :

> 'In exercise of the powers confer red by Article 309 of the Constitution of India and in supersession of all existing rules and orders on the subject..'
> (Emphasis supplied)

"18. "In supersession of all existing rules and orders on the subject" can only refer to those matters in the existing rule which correspond to the matters dealt with by the 1950 Rules. We have explained earlier the other subjects in the 1947 Rule which were not covered by the 1950 Rules. Hence the argument based on the assumption that the entire. 1947 Rules had been repealed by implication and no amendment could be made to the 1947 Rules has to be rejected The High Court was, therefore, right in observing that the whole of the 1947 Rules did not come to an end on the promulgation of the 1950 Rules. The problem, however, does not set solved thereby as we shall presently show.

19. The 1969 Amending Rules specifically amended the 1947 Rules. These 1969 Amending Rules appear to have been made after consultation with the High Court as can be seen from the letter dated November 30, 1968 written by the Joint Registrar of the High Court to the Joint Legal Remembrancer of the Government of Uttar Pradesh The 1969 Amending Rules were published in the Uttar Pradesh Gazette dated October 9, 1969. By these Rules, rule 5 of the 1947 Rules was amended. Rule 5 dealt with the minimum academic qualification which a candidate for a post in the ministerial establishment in a Subordinate Civil Court should possess. The other amendment related to the substitution of the former Appendix II which related to the subject prescribed for the competitive examination and the marks assigned to each of them as it obtained before the 1950 Rules came into force by a new Appendix which has already been set out above.

20. Rule 11 of the 1947 Rules which required the District Judge to hold the examination in accordance with the former Appendix II of the 1947 Rules which also stood superseded by the 1950 Rules in view of rules 5 and 7 of the 1950 Rules which dealt with the same subject, was however not replaced nor a corresponding rule authorising the District Judge to hold the competitive examination in accordance with the new Appendix II was introduced by the 1969. Amending Rules into the 1947 Rules simultaneously. The result was that while the new Appendix II again reappeared in the 1947 Rules prescribing certain subjects and marks assigned to them, the authority who should hold the competitive examination was not again prescribed in the 1947 Rules. It was necessary to re-enact rule II of the 1947 Rules because it also stood repea

ed by the 1950 Rules which had made rovision with regard to the topic contained in the former rule 11. The legal osition that by the promulgation of he 1950 Rules, the former rules 9 to 2 of the 1947 Rules stood repealed by ecessary implication is accepted even y the High Court in its letter dated February 12, 1973 referred to above. Therefore the former rule 11 should ave been re-enacted either in the same orm or with modification and brought ack to life to give effect to the new Appendix II reintroduced in the 1947 Rules. Without such reintroduction of ule 11, the mere reintroduction of Appndix II in the 1947 Rules by the 1969 Amending Rules would be meaningless nd ineffective as the authority who can old the examination remained unspecied. The method of selection of candilates also remained unspecified The nethod of selection of candidates also emained unspecified In effect whatver was provided in rules 9 to 12 of the 947 Rules which was needed for conucting the examination and selecting andidates was however unavailable. It s not correct to assume that the old ules 9 to 12 also automatically revived long with Appendix II without an xpress provision reintroducidg them Here we are not trying to be echnical. It is to be noted that the 869 Amending Rules do not expressly tate that the 1950 Rules would no onger be applicable to the ministerial stablishments of the Subordinate Civil Courts. They also did not repeal the tem referring to the Judicial Department—Subordinate Civil Courts, which found a place in the schedule to the 1950 Rules The discontinuance of the application of the 1950 Rules to the ministerial estrblishments of the Subordinate Civil Courts can only be inferred by relying upon the rule of implied repeal provided the said rule is applicable. An implied repeal of an earlier law can be inferred only where there is the enactment of a later law which had the power to override the earlier law and is totally inconsistent with the earlier law, that is, where the two laws-the earlier law and the later law—cannot stand together. This is a logical necessity because the two inconsistent laws cannot both be valid without contravening the principle of contradiction. The later laws abrogate earlier contrary laws. This principle is, however, subject to the condition that the later law must be effective. If the later law is not capable of taking the place of the earlier law and for some reason cannot be implemented, the earlier law would continue to operate. To such a case the rule of implied repeal is not attracted because the application of the rule of implied repeal may result in a vacuum which the law making authority may not have intended Now, what does Appendix II contain. It contains a list of subjects and marks assigned to each of them But who tells us what that list of subjects means It is only in the presence of rule 11 one can understand the meaning and purpose of Appendix II. In the absence of an amendment re-enacting rule 11 in the

1947 Rules, it is difficult to hold by the application of the doctrine of implied repeal that the 1950 Rules have ceased to be applicable to the ministerial establishments of the Subordinate Civil Courts. The High Court overlooked this aspect of the case and proceeded to hold that on the mere reintroduction of the new Appendix II into the 1974 Rules, the examinations could be held in accordance with the said Appendix. We do not agree with this view of the High Court.

21. There is also no material before the Court to show that after the Rules of 1969 Amending Rules, examinations were held in the different districts Uttar Pradesh in accordance with the 1947 Rules as amended by the 1969 Amend ing Rules. No body including the High Court appears to have taken notice of the amendment. On the other hand examinations have been held according to the 1950 Rules even after the above 1969 amendment The District Judge has filed a counter-affidavit stating that the examinations were held in 1981 in this case in accordance with the 1950 Rules and not in accordance with the 1947 Rules as amended by the 1969 Amending Rules. The letter of the High Court dated February 12, 1973 shows that it treated the 1950 Rules as the existing Rules in 1973 even after the 1969 Amending Rules came into force because it is stated in that letter as follows :—

> "While following the procedure laid down in the existing rules, published under Government Notification N O-1119/XI-8-50 dated July 11, 19 (which was adopted in supersession rules 9 to 12 of the U.P. Subordina Civil Courts Ministerial Establishme Rules 1947) and amplified in G O-No 2248/11-8-III-1960 dated August 3 1950, the District Judge should ......
>
> (Emphasis adde

Further it appears that in the ye 1981 in some other districts of Utt Pradesh examinations were held as p the 1950 Rules. This is borne out b the observation of the Hig Courts in its judgment where it h expressed its reluctance to set asi the results of the examinations in t other districts and confined the opera tion of its judgment to Kanpur Distri only. The 1969 Amending Rules appea to have been ignored by some Distri Judges. In the circumstances havin regard to the lacuna created by the non repromulgation of rule 11 of the 194 Rules it has to be held that there wa no effective substitution of the 195 Rules brought about by the 196 Amending Rules. The 1950 Rule should therefore be held to be operatin even in the year 1981 Hence the examinations held according to them can not be held to be bad.

22. We do not agree with the vie of the High Court that the 1950 Rule have been repealed by the 1975 Rule insofar as the Subordinate Civil Court are concerned. It is true that rule 2 of the 1975 Rules clearly stated that th 1950 Rules haue been repealed But th

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E. S. Venkataramiah
Judge
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1975 Rules did not apply to the subordinate courts under the control and superintendence of the High Court. Hence the 1950 Rules insofar as they applied to the subordinate courts continued to be in force. The finding of the High Court on this question is erroneous and is liable to be set aside.

23. Moreover, this is a case where the petitioner in the writ petition should not have been granted any relief. He had appeared for the examination without protest. He filed the petition only after he had perhaps realised that he would not succeed in the examination. The High Court itself has observed that the setting aside of the results of examinations held in the other districts would cause hardship to the condidates who had appeared there. The same yardstick should have been applied to the candidates in the District of Kanpur also. They were not responsible for the conduct of the examination

24. For the foregoing reasons we feel that the judgment of the High Court should be set aside. We accordingly set aside the judgment of the High Court and dismiss the Writ Petition. The appellant and all other successful candidates at the 1981 examination held in Kanpur shall be appointed in accordance with the Rules. We further direct that they shall be given the salary, allowances, increments and seniority to which they would have been entitled but for the judgment of the High Court. But they will not be entitled to any salary and allowances for the period during which they have not actually worked. We also make it clear that if in any other centre, selections and appointments have been made on the basis of the 1969 Amending Rules they shall remain undisturbed.

25. The order passed by the High Court in the connected writ petition No. 10224 of 1983 on its file is also set aside. Similarly the order passed in writ petition No. 5073 of 1984 on the file of the High Court is also reversed. There shall be a common order in these connected cases as directed in this appeal.

26. The appeal is accordingly allowed No costs.

27. The High Court may take steps, if it so desires, to promulgate a fresh set of Rules of recruitment for the staff in the subordinate courts early.

Appeal allowed.

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IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

A.P. Sen
Judge
Supreme Court of India

OBSERVATION

(A) Constitution of India, Arts. 309 Proviso; 311; 226—Railway Servants cipline and Appeal) Rules (1968), Rr. 22 (2), 6 (vil), 10 (5), 18 (ii) —Railway ant—Penalty of removal under R. 6 (viii)—Appeal before Railway Board er R. 18 (ii)—Dismissal of appeal—Mechanical reproduction of phraseology R. 22 (2)—Held, there was non-compliance with requirements of R 22 (2)— ellate order must be set aside—Natural justice—Right to make representation proposed penalty taken away by Forty Second Amendment—Appellate autho- all the more, must pass reasoned order—L P. A. No. 178 of 1983 D/- 15-2-1984 hi) Reversed.

(B) Interpretation of Statutes—Pari materia—Rule 27 (2) of the Central Civil ices (Classification, Control and Appeal Rules, 1965 is in pari material with 2 (2) of the Railway Servants (Discipline and Appeal) Rules, 1968— (Para 4)

OBSERVED BY

A. P. Sen and B. C. Ray

Hon'ble Judges Supreme Court of India

IN

Civil Appeal No. 1621 of 1986 decided on 2-5-1986 between Ram Chander, ellant v. Union of India and others, Respondents.

TEXT

A. P. Sen, J :— The Central ques- in this appeal is whether the impu- d order passed by the Railway rd dated March 11, 1972 dismis- the appeal preferred by the appe- t, was not in conformity with the uirements of R. 22 (2) of the Rail- Servants (Discipline and Appeal) es, 1968.

At the hearing on Feb. 13, 1986, ned counsel for the Union of In- took time to enable the Railway rd to reconsider its decision as to quantum of punishment. At the umed hearing on March 13 1986 we were informed by the learned counsel that there was no question of the Railway Board reconsidering its decision. Arguments were accordingly heard on the question as to whether the impugned order of the Railway Board was sustainable in law. We heard the parties and allowed the appeal by order dated March 13, 1986 directing the Railway Board to hear and decide the appeal afresh on merits in accordance with law in conformity with the requirements of R. 22 (2) of the Rules. We now proceed to give reasons therefor.

2. The Facts. The appellant Ram Chander, Shunter, Grade B at Loco-Shed Ghaziabad was inflicated the penalty of removal from service under R. 6 (viii) of the Railway Servants (Discipline and Appeal) Rules, 1968 by order of the General Manager, Northern Railway dated Aug. 24 1971. The gravemen of the charge was that the appellant was guilty of misconduct in that he had on Oct. 1, 1969 at 7.30 p.m. assaulted his immediate superior Banarsi Das, Assistant Loco Foreman while he was returning after performing his duties. The immediate cause for the assault was that the appellant had on Sept 30, 1969 applied for medical leave for one day i. e. for Oct. 1, 1969. On that day, there was a shortage of shunters and he accordingly asked Banarsi Das to resume his duties but Banarsi Das refused to cancel the leave already granted and therefore the appellant nursed a grouse against him because he was thereby deprived ot the benefit of one day's additional wages for October 2, 1969 which was a national holiday. Apparently, Banarsi Das lodged a report with the police but no action was taken thereon. More than a month later i.e. on November 17, 1969 Banarasi Das made a complaint against the appellant to his superior officers and this gave rise to a departmental proceeding. The Enquiry Officer fixed the date of enquiry on May 11, 1970 at Ghaziabad. The enquiry could not be held on that date due to some administrative reasons and was then fixed for July 11, 1970 The appellant was duly informed of the date but he did
appear at the enquiry. The En
Officer accordingly proceeded ex
and examined witnesses By his r
dated May 26, 1971, the Enquiry O
found the charge proved. The Ge
Manager, Northern Railway agreed
the report of the Enquiry Officer
came to the provisional conclusion
the penalty of removal from se
should be inflicted and issued a
cause notice dated May 26, 1971
compliance the appellant showed
but his explanation was not acce
by the General Manager who by
order dtd. August 24, 1971 imp
on the appellant the penalty of rem
from service. The appellant prefe
an appeal before the Railway B
under R. 18 (ii) of the Railway Serv
(Discipline and Appeal) Rules,
but the Railway Board by the impug
order dated March 11, 1972 dismi
the appeal Thereafter, the appe
moved the High Court by a peti
under Art. 226, of the Constitution
learned Single Judge by his order d
Aug 16, 1983 dismissed the writ peti
holding that since the Railway B
agreed with the findings of the Gen
Manager there was no duty cast on
Railway Board to record reasons
its decision. The appellant there
preferred a Letters Patent Appeal,
a Division Bench by its order d
Feb 15, 1984 dismissed the appea
limine.

3 Rule 22(2) of the Railway
vants Rules provided as follows :—

“22(2) In the case of an ap

against an order imposing any of the penalties specified in Rule 6 or enhancing any penalty specified in Rule 6 or enhancing any penalty imposed under the said rule, the appellate authority shall consider–

(a) whether the procedure laid down in these rules has been complied with, and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice;

(b) whether the findings of the disciplinary authority are warranted by the evidence on the record; and

(c) whether the penalty or the enhanced penalty imposed is adequate, inadequate, or severe;

and pass orders—

(i) confirming, enhancing; reducing or setting aside the penalty; or

(ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such directions as it may deem fit in the circumstances of the case."

4. The duty to give reasons is an incident of the judicial process. So, in R.P. Bhatt v. Union of India (C A No. 3165/81 decided on Dec. 14, 1982) : (reported in 1986 Lab IC 790) this Court, in some what similar circumstances, interpreting R 27(2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 which provision is in pari materia with R 22 (2) of the Railway Servants (Discipline and appeal) Rules, 1968, observed :

"It is clear upon the terms of R. 27 (2) that the appellate authority is required to consider (1) whether the procedure laid down in the rules had been complied with; and if not, whether such non compliance has resulted in violation of any of the provisions of the Constitution of India or in the failure of justice; (2) whether the findings of the disciplinary authrity are warranted by the evidence on record; and (3) whether the penalty imposed is adequate, inadequate or servere, and pass orders confirming, enhancing, reducing of setting aside the penalty, or remit back the case to the authority which imposed or enhanced the penalty, etc."

It was held that the word 'consider' in R. 27(2) of the Rules implied 'due application of mind.' The Court emphasized that the Appellate Authority discharging quasi-judicial functions in accordance with natural justice must given reasons for its decision. There was in that case, as here, no indication in the impugned order that the Director-General, Border Road Organisation, New Delhi, was satisfied as to the aforesaid requirements. The Court observed that he had not recorded any finding on the crucial question as to whether the findings of the disciplinary authority were warranted by the evidence on record. In the present case, the impugned order of the Railway Board is in these terms :

"(1) In terms of Rules 22(2) of the Railway Servants (Discipline and Appeal) Rules 1968, the Railway Board have carefully considered your appeal against the orders of the General Manager, Northern Railway, New Delhi, imposing on you the penalty of removal from service and have obsereved as under :

(a) by the evidence on record, the findings of the disciplinary authority are warranted; and

(b) the penalty of removal from service imposed on you is merited."

(2) The Railway Board have therefore rejected the appeal preferred by you."

5. To say the least, this is just a mechanical reproduction of the phraseology of R. 22 (2) of the Railway Servants Rules without any attempt the part of the Railway Board either to marshall the evidence on record with a view to decide whether the findings arrived at by the disciplinary authority could be sustained or not There is also no indication that the Railway Board applied its mind as to whether the act of misconduct with which the appellant was charged together with the attendant circumstances and the past record of the appellant were such that he should have been visited with the extreme penalty of removal from service for a single lapse in a span of 24 years of service. Dismissal or removal from service is a matter of grave concern to a civil servant who after such a long period of service, may not deserve such a harsh punishment. There being non-compliance with the requirements of R. 22 (2) of the Railway Servants Rules, the impugned order passed by the Railway Board is liable to be set aside.

6. It was not the requirement of Art. 311 (2) of the Constitution prior to the Constitution (Forty-Second Amendment) Act, 1976 or of the rules of natural justice, that in every case appellate authority should in its order state its reasons except where the appellate authority disagreed with the findings of the disciplinary authority In State of Madras v. A. R. Srinivasan, AIR 1966 SC 1827 Constitution Bench of this Court while repelling the contention that the impugned order by the State Government accepting the findings being in the nature of quasi-judicial proceedings was bad as it did not give reasons for accepting the findings of the Tribunal, observed as follows:—

"In dealing with the question as to whether it is obligatory on the State Government to give reasons in support of the order, imposing a penalty on the delinquent officer. we cannot overlook the fact that the disciplinary proceedings against such a delinquent officer begin with an enquiry conducted by an officer appointed in that behalf. The enquiry is followed by report and the Public Service Commission is consulted where necessary. Having regard to the material which is thus made available to the State Government and which is made available to the delinquent officer also, it seems to somewhat unreasonable to suggest that the State Government must record its reasons hy it accepts the finding of the Tri- unal. It is conceivable that if the tate Government does not accept the ndings of the Tribunal which may be 1 favour of the delinquent officer and roposes to impose a penalty on the elinquent officer, it should give reasons hy it differs from the conclusion f the Tribunal, though even in such case, it is not necessary that the rea- ons would be detailed or elaborate. ut where the State Government agrees ith the findings of the Tribunal which re against the delinquent officer, we o not think as a matter of law, it ould be said that the State Govern- ent cannot impose the penalty against he delinquent officer in accordance ith the findings of the Tribunal unless t gives reasons to show why the said indings were accepted by it. The pro eedings are, no doubt quasi-judicial; ut having regard to the manner in hich these enquries are conducted, ve do not think an obligation can be mposed on the State Government to ecord reasons in every case."

7. Again, in Som Datt Datta v. Jnion of India, (1969) 2 SCR 177, a Constitution Bench of this Court rejec- ed the contention that the order of he Chief of the Army Staff confirming he proceedings of the General Court Martial under S. 164 of the Army Act, 950 and the order of the Central Government dismissing the central appeal of he delinquent officer under S. 165 of the Act were illegal and ultra vires as they lid not give reasons in support of the orders and summed up the legal position in these words :

"Apart from any requirement imposed by the statute or statutory rules either expressly or by necessary implication, there is no legal obligation that the statutory tribunal should give reasons for its decision. There is also no general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision."

8. So also in Tara Chand Khatri v. Municipal Corpn. of Delhi (1977) 2 SCR 198 : (AIR 1977 SC 567), this Court observed that there was a vital difference between an order of reversal by the appellate authority and an order of affirmance and the omission to give reasons for the decision may not by itself be a sufficient ground for passing such order, relying on the test laid down by Subha Rao J in Madhya Pradesh Industries Ltd. v. Union of India (1966) 1 SCR 466 :

"Ordinarily, the appellate or revisional authority shall give its own reasons succinctly; but in a case of affirmance where the original tribunal gives adequate reasons, the Appellant Tribunal may dismiss the appeal of the revision, as the case may be, agreeing with those reason."

9. These authorities proceed upon the principle that in the absence of a requirement in the statute or the rules. there is no duty cast on an appellate authority to give reasons where the order it one of affirmance. Here, R. 22 (2) of the Railway Servants Rules

in express terms requires the Railway Board to record its findings on the three aspects stated therein. Similar are the requirement under R. 27 (2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. R. 22 (2) provides that in the case of an appeal against an order imposing any of the penalities specified in R. 6 or anhancing any penalty imposed under the said rule, the appellate authority shall consider' as to the matters indicated therein. The word 'consider' has different shades of meaning and must in R. 22 (2), in the context in which it appears, mean an objective consideration by the Railway Board after due application of mind which implies the giving of reasons for its decision

10. After the amendment of cl. (2) of Art. 311 of the Constitution by the Constitution (Forty-Second Amendment) Act, 1976 and the consequential change brought about in R. 10 (S) of the Railway servants (Discipline and Appeal) Rules, 1968, substituted by the Railway Servants (Discipline and Appeal) (Third Amendment) Rules, 1978, it is no longer necessary to afford a secand opportunity to the delinquent servant to show cause against the punishment. The Forty-Second Amendment has deleted from cl (2) of Art. 311 the requirement of a reasonable opportunity of making representation on the proposed penalty and, further, it has been expressly provided inter alia in the first proviso to cl. (2) that :

"Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed."

11. After the amendment, the requirement of cl. (2) will be satisfied by holding an inquiry in which the Government servant has been informed of the charges against him and given a reasonable opportunity of being heard. But the essential safeguard of showing his innocence at the second stage i. e after the disciplinary authority has come to a tentative conclusion of guilt upon a perusal of findings reached by the Inquiry Officer on the basis of the vidence adduced, as also against the proposed punishment, has been removed to the detriment of the delinquent officer. In view of the said amendment of Art. 311 (2) of the Constitution, R 10 (5) of the Railway Servants Rules has been sustained to bring it in conformity with cl. (2) of Art. 311, as amended. R 10(5), as substituted, provides as follows :

"10(5) If the disciplinary authority, having regard to its findings on all or any of the article of charge and on the basis of the evidence adduced during the inquiry, is of the opinion that any of the penalties specified in clause (v) to (ix) of rule 6 should be imposed on the railway servant, it shall make an order imposing such penalty and it shall not be necessary to give ort No. 28, p 07

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railway servant any opportunity
naking representation on the penalty
posed to be imposed:

Provided that in every case where
necessary to consult the Commi-
n, the record of the inquiry shall
forwarded by the disciplinary
nority to the Commission for its
ice and such advice shall be taken
consideration before making an
er imposing any such penalty on the
way servant."

12. We may here mention that a
esponding change in the Central
.l Services (Classification, Control
Appeal) Rules. 1965 has been
ught by substituting R. 15 (4)
ng away the procedural safeguard
making a representation at the
ond stage i. e. before imposing
ishment on the dasis of the evidence
he inquiry.

13. In Union of India v. Tulsiram
el (1985) 3 SCC 398, a five-Judge
ch by a majority of 4 : 1 held that
re a departmental inquiry was wholly
ensed with in the three situations
er the second proviso to Art. 311
the only right to make a represent-
n on the proposed penalty which
to be found in cl. (2) of Art. 311
he Constitution prior to its amend-
t having been taken away by the
stitution (Forty-Second Amend-
t) Act, 1976, there is no provision
law under, which a Government
ant can claim this right. This Court
week in the Secretary, Central
rd of Excise & Customs v. K. S. Mahalingam (C. A. No, 1279/86 decided on April 24, 1986) after referring to the constitutional changes brought about observed:

> "After the amendment, the requirement of cl. (2) will be satisfied by holding an inquiry in which the Government servant has been informed of the charges against him and given a reasonable opportunity of being heard."

13A. After the majority decision in Tulsiram Patel's case, it can no longer be disputed that the right to make a representation on the proposed penalty which was to be found in cl (2) of Art. 311 of the Constitution having been taken away by the Forty-Second Amendment, there is no provision of law under which a Government servant can claim this right.

14. It seems to be purely academic to refer to the vintage decision of the Privy Council in High Commissioner for India v. I. M. Lall, 75 Ind App 225 and that of this Court in khem Chand v. Union of India, 1958 SCR 1080 : (AIR 1958 SC 300) following it or the plethora of decisions thereafter which have now become otiose after the Forty Second Amendment by which the words "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him" were deleted at the end of cl. (2) of Art. 311 and proviso to cl. (2) substituted, with the object of doing away with the second opportunity of making representation at the

stage of imposing penalty i. e. at the conclusion of the inquiry. It is however necessary to refer to these two decisions briefly with the object of showing the prejudicial effect on such delinquent Government servants. More so, because the majority decision in Tulsiram patel's case (AIR 1985 SC 1416) seeks to justify the amendment effected by the Forty-Second Amendment of cl. (2) of Art. 311 by observing that 'cl. (2) of Art. 311 as originally enacted and the legislative history of that clause wholly rule out the giving of any opportunity.' We have our own reservations about the correctness of this proposition. It is not quite accurate to suggest that the opportunity of showing cause before a Government servant was dismissed, removed or reduced in rank was not contemplated by law nor justified by the legislative history.

15. In I. M. Lall's case, Lord Thankertion while interpreting the words 'a reasonable opportunity of showing cause against the action proposed to be taken in regard to him in sub-s. (3) of S. 240 of the Government of India Art 1935 speaking for the Judicial Committee of the Privy Council, observed :

"In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Before (prior to?) that stage, the charges are unproved and the suggeste punishments are merely hypothetical."

(Emphasis supplied)

That very distinguished Judge wer on to say :

"It is on that stage reached tha the staute gives the civil servant th opportunity for which sub-s. (3) make provision.

and then added :

"Their Lordships would only ad that they see no difficulty in the stat utory opportunity being reasonably af orded at more than one stage. If th civil servant has been through an en quiry under Rule 55, it would not b reasonable that he should ask for a re petition of that stage, if duly carrie out but that would not exhaust hi statutory right, and he would still b entitled to represent against the puni shment proposed as the result of th findings of the inquiry."

16. The phrase 'a reasonable op portunity of showing cause against th action proposed to be taken in regar to him, appearing in sub-s. (3) of S 240 of the Government of India Act 1935 was reproduced in cl. (2) of Art 311 of the Constitution as originall enacted i. e. prior to its amendmen by the Constitution (Fifteenth Amendment) Act, 1963. It would appear tha in the original Art. 311 (2) as it stoo before the Fifteenth Amendment, th obligation to afford an opportunity at two stages, namely, at the stage of inquiry into the charges and

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gain, at the stage of awarding punish- ient, was not explicitly stated in the Article itself It merely required that pportunity must be given to show ause against the 'action proposed'. As already stated, the obligation to ffer such opportunity at two stages was owever deduced judicially by the privy Council in I. M. Lall's case.

17. In Khemchand's case, (AIR 958 SC 300) the Court following the udgment of the Privy Council in I. M. Lall's case came to the same conclusion rom the word 'reasonable'. The Gover- ment servant not only be given an pportunity but such opportunity must e a reasonable one. In order that the pportunity to show cause against the roposed action may be regarded as a easonable one, it is quite necessary that he Government servant should have the pportunity, to say, if that be his case, hat he has not been guilty of any isconduct to merit any punishment t all and also that the particular unishment proposed to be given is uch more drastic and severe than e deserves. It referred to the above assages from the judgment of the Privy Council in I.M. Lall's case, and obser- ed:

> "Further opportunity is to be given o the Government servant after the harges have been established against im and a particular punishment is roposed to be meted out to him."

In short, the substance of the protecti- n provided by Rules, like R. 55 referred o above, was bodily lifted out of the rules and together with an additional opportunity embodied in S 240 (3) of the Government of India Act, 1935 so as to give a statutory protection to the Government servants had now been incorporated in Art. 311 (2) so as to convert the protection into a constitutional. The legal consequence therefore was that:

> "At the second stage, the delinquent Government servant was therefore entitled to contend--
>
> (a) That the inquiry at which the findings were arrived at was vitiated by a breach of the principles of natural justice.
>
> (b) That the findings were not supported by the evidence in the proceedings, or that the evidence against him was not him worthy of credence or that he was not guilty of any misconduct to merit any punishment at all.
>
> (c) That the punishment propoed could not be properly awarded on the findings arrived at, that is to say, the charges proved did not require the particular punishment proposed to be awarded."

18. After Parliament frustrated the attempt of the Government to delete the constitutional safeguard as evolved by this Court at Khem Chand's case following the principles laid down in the Privy Council decision in I.M. Lall's case by deletion of the words 'a reasonable opportunity of showing cause against the action proposed to be taken in regard to him' by the Constitu-

tion (Fifteenth Amendment) Act, 1963, it seems somewhat strange that after more than a decade the Government of the day thought it fit to remove this valuable safeguard by the Forty-Second Amendment. It is particularly important to notice how closely Members of Parliament scrutinised the motives of the Government while discussing the Fifteenth Amendment Bill and it is profitable to read the debates leading to the passing of the Fifteenth Amendment. There could scarcely be a better example of the principle that the constituent powers to amend the Constitution, however permissibie, must be used with scrupulous attention to their true purpose and for reasons that are relevant and proper. A determined attempt on the part of the Government to unsettle the law as laid down by this Court was successfully frustrated on that occasion. Although the clause as originally in the Amendment Bill was deficient insofar as it conferred no express protection as regards the second stage i. e. the stage of punishment, but the Fifteenth Amendment Act as passed, introduced the requirement of giving a reasonable opportunity on the penalty proposed, after the conclusion of the inquiry into the charges and after a penalty had been provisionally determined. After considerable debate in Parliament, Shri Asoke Sen. Law Minister, intervened, in deference to the concern expressed by members representing all sections of the House over the Amendment Bill by which the Government was seeking to remove the opportunity at the second stage, and gave an assurance that he would mov an amendment, making it clear that th second opportunity in regard to th punishment proposed would be retaine but such opportunity shall be only o the basis of the evidence adduced durin the inquiry. The Government accordingly moved the following amendment

> “And where it is proposed, afte such inquiry, to impose on him an such penalty, until he has been given reasonable opportunity of making representation on the penalty proposed but only on the basis of the evidenc adduced during such inquiry.”

19. We may recall the words o the Law Minister on that occasion whil intervening in the debate on the origina draft.

> “Now, Sir, as I explained, wher the motion was first before the Hous and before it went to the Joint Committee it was never the intention of the Government to vary Rule 25 of the Civil Service Rules which provided for representation by the civil servant against the penalty proposed. The point taken was that in future some irresponsible Government might do away with Rule 25 ignoring the assurance given to Parliament. Well, then I told the representatives of the civil servants and other representatives of the INTUC who had come to see me to give me a draft which would make it quite clear that the repersentation against the penalty proposed would not include any right to insist on further hearing and further evidence being given. They gave me that draft which I have accepted with a

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ght modification.

I, therefore, dispel any idea, if there
any, that there has been any deviat-
n from the ideals of democracy and
eservation of the vital rights not only
civil servants but of the citizens.
hope we shall never deviate from that
urse because it is our great strength
d it is through the processes of demo-
acy that we are functioning, not thro-
h the processes of fear or force (Lok
bha Debates, 3rd Series, Vol. XVIII,
63, 4th Session, P- 13152-54).

20. The Fifteenth Amendment,
fact, clarified the legal position under
e existing law by requiring that oppor-
nity must be given to the delinquent
overnment servant not only at the
st stage to be heard in respect of the
arges but also at the second stage i. e.
ter the disciplinary authotity had come
a tentative conclusion of guilt at the
nclusion of the inquiry and had deci-
ed upon the punishment proposed to
e inflicted. It was a necessary and
fficient sufeguard against arbitary
d excessive executive action written
to the Constitution. Unfortunately,
w the Forty-Second Amendment has
hieved what the Fifteenth Amendment
uld not. By the constitutional amend-
ent, the Government be taken away
e essential constitutional safeguard.

21. It is a fundamental rule of law
at no decision must be taken which
ill affect the rights of any person with-
t first giving him an opportuuity of
utting forward his case. Both the
rivy Council as well as this Court have
a series of cases required strict adherence to the rules of natural justice where a public authority or body has to deal with rights. Unfortunately the first proviso to cl. (2) of Art. 311 has eliminated the rule audi alteram partem at the second stage i. e. observance of the rules of natural justice and the requirement of a reasonable opportunity of making representation on the proposed action. The question still remain as to the state when the delinquent Government servant would get the opportunity of showing cause against the action taken against him. Where does he get an opportunity to exonerate himself from the charge unless he is allowed to show that the evidence adduced at the inquiry is not worthy of credence or consideration? Does he ever get a right to show that he has not been guilty of any misconduct so as to deserve any punishment, or that the charges proved against him are not of such a character as to merit the extreme penalty of dismissal or even of removal or reduction in rank and that any of the lesser punishment ought to have been sufficient in his case? But we are bound by the majority decision in Tulsiram Patel's case.

22. After the constitutional change brought about it seems that the only stage at which now a civil servant can exercise this valuable right is by enforcing his remedy by way of a departmental appeal or revision, or by way of judicial review. In Tulsiram Patel's case (AIR 1985 SC 1416), the majority decision has pointed out that even after the Forty-Second Amendment, the inquiry required by cl. (2) of Art. 311

would be the same except that it would not be necessary to give to a civil servant an opportunity to make representation with respect to the penalty proposed to be imposed on him. In such a case, a civil servant who has been dismissed, removed or reduced in rank by applying to his case one of the clauses of the second proviso to Art 311 (2) or the analogous Service Rule has two remedies available to him. These remedies are : (i) the appropriate departmental appeal provided for in the relevant Service Rules, and (ii) if still dissatisfied, invoking the Court's power of judicial review. In Satyavir Singh v. Union of India (1985) 4 SCC 252 : (AIR 1986 SC 555) there is an attempt made to analyse the rationes decidendi of the majority decision in Tulsiram Patel's Case and the nature of the remedies left to the civil servant at Pp 276-281 (of SCC) of the report. If that be so, in a case governed by one of the clauses of the second proviso to Art. 311 (2) or an analogous Service Rule, there is still all the more reason that in case not governed by the second proviso, a civil servant subjected to disciplinary punishment of dismissal, removal or reduction in rank under cl. (2) of Art. 311 would have these remedies left to him. Virtually this is tantamount to a post-decisional hearing.

23. There has been considerable fluctuation of judicial opinion in England as to whether a right of appeal is really a substitue for the insistence upon the requirement of a fair hearing or the observance of natural justi which implies 'the duty to act judiciall Natural justice does not require th there should be a right of appeal fro any decision. This is an inevitab corollary of the fact that there is right of appeal against a statuto authority unless the statute so provide Professor HWR Wade in his Admini trative Law, 5th edn., at P. 487 o serves :

"Whether a hearing given on appe is an acceptable substitute for a hearin not given, or not properly given, befo the initial decision is in some cases a arguable question. In principle the ought to be an observance on natur justice equally at both stages .... natural justice is violated at the fir stage, the right of appeal is not so muc a true right of appeal as a correcte initial hearing : instead of fair tri followed by appeal, the procedure reduced to unfair trial followed fair trial."

After referring to Megarry, J. dictum in a trade union expulsion cas holding that, as a general rule, a failur of natural justice in the trial body can not be cured by a sufficiency of natura justice in the appellate body, the learne author observes :

"Nevertheless it is always possibl that some statutory scheme may impl that the 'appeal' is to be the only hear ing necessary."

24. Professor de Smith at P 242-43 refers to the recent greate readiness of the Court to find a breac of natural justice 'cured' by a subse

nt hearing before an appellate trib-
l. In Swadeshi Cotton Mills v.
on of India, (1981) 2 SCR 533
ough the Majority held that the
ression "that immediate action is
essary" in S. 18 AA (1) (a) of the
ustries (Development and Regulat-
) Act, 1951, does not exclude ab-
tely, by necessary implication, the
lication of audi alteram partem
, Chinnappa Reddy, J. dissented
n the view and expressed that the
ression 'immediate action' may in
ain situations mean exclusion of
applicеation of the rules of natural
ice and a post decisional hearing
vided by the statute itself may be a
icient substitute. It is not necessary
our purposes to go into the vexed
stion whether a post decisional hear-
is a substitute of the denial of a
nt of hearing at the initial stage or
observance of the rules of natural
tice since the majority in Tulsiram
el's case (AIR 1985 SC 1416) un-
ivocally lays down that only stage
which a Government servant gets
reasonable opportunity of showing
se against the action proposed to
taken in regard to him' i.e. an
portunity to exonerate himself from
charge by showing that the evid-
e adduced at the inquiry is not
rthy of credence or consideration
that the charges proved against him
not of such a character as to
rit the extreme penalty of dismis-
or removal or reduction in rank
d that any of the lesser punishments
ght to have been sufficient in his
se, is at the stage of hearing of a
partmental appeal. Such being the legal position, it is of utmost importance after the Forty-Second Amendment as interpreted by the majority in Tulisram Patel's case that the Appellate Authority must not only give hearing to the Government servant concerned but also pass a reasoned order dealing with the contentions raised by him in the appeal. We wish the emphasize that reasoned decisions by tribunals, such as the Railway Board in the present case, will promote public confidence in the administrative process. An objective consideration is possible only if the delinquent servant is heard and given a chance to satisfy the Authority regarding the final orders that may be passed on his appeal. Considerations of fair-play and justice also require that such a personal hearing should be given.

25. In the result, the appeal must succeed and is allowed. The judgment and order of a learned single Judge of the Delhi High Court dated Aug. 16, 1983 and that of the Division Bench dismissing the Letters Patent Appeal filed by the appellant in limine by its order dated Feb. 15, 1984 are both set aside, so also the impugned order of the Railway Board dated March 11, 1972. We direct the Railwag Board to hear and dispose of the appeal after affording a personal hearing to the appellant on merits by a reasoned order in conformity with the requirements of R 22 (2) of the Railway Servants (Discipline & Appeal) Rules, 1968, as expeditiously as possible, and in any event, not, later than four months from today.

Appeal allowed

2928
Report No 28, P. 14

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

eport No. 29, p. 01

O. Chinnappa Reddy
Judge
Supreme Court of India

OBSERVANCE

Constitution of India, Arts. 309 Proviso, 311—Punjab Government National mergency (Concessions) Rules (1965) Rr 4 (ii) 2—Seniority—Determination of—x-army personnel—Military service rendered by him during period of emergency nly could be taken into account and not entire military service—Military service ndered subsequent to lifting of emergency could not be taken into account for eckoning seniority in civil post. (Para 1)

OBSERVED BY

O. Chinnappa Reddy and V. Balakrishna Eradi
Hon'ble Judges Supreme Court of India.

IN

Review Petitions Nos. 107, 107-A & 107-B of 1986 decided on 10-4-1986 etween Ex-Capt. A. S. Parmar and others, Appellants v. State of Haryana and thers, Respondents.

TEXT

O. Chinnappa Reddy, J. :—These etitions have been filed by the State f Haryana to review an order made y us in CMP Nos. 37521 of 1984 nd 24308 of 1985 in Civil Appeals Ios. 3095-96 of 1980 and Writ Peti-on No.8328 of 1981. Ex-Captain . S. Parmar & others were the appe-ants in Civil Appeals Nos. 3095-96 f 1980 and Hawa Singh Dhillon was he petitioner in Writ Petition No. 328 of 1981. These civil appeals and rit petitions along with some other ivil appeals and writ petitions were isposed of by a judgment pronounced y us on April 26, 1984 : (reported n 1984 Lab IC 1015). The grievance f the appellants and the petitioners herein was that by an amendment of he Punjab National Emergency (Con-essions) Rules, 1965 made in 1976, certain benefits which had been given to persons,who had volunteered for military service during the external emergency had been illegaally taken away. This court granted the following relief :

"The impugned Rule 4 (ii) of the Punjab Government National Emergencncy (Concessions) Rules, 1965, as amended by the Haryana Government Gazette Notification No. GSR-77/Const/Art. 309/Amend/(1)/76 dated March 22, 1976 and the Notification No. GSR-182/Const/Art 309/Amend/(2)/76 dated August 9, 1976 amending the definition of the expression 'military service' in Rule 2, are declared to be ultra vires the Constitution in so far as they affect prejudicially persons who had acquired rights as stated above. A writ in the nature of mandamus issued directing respondents 1 and 2 to prepare the seniority list afresh in the light of the decision of this Court taking into consideration the military service rendered by the petitioners as well as the appellants."

Alleging that the State of Haryana was not implementing the judgment of the court, the appellants in Civil Appeals Nos. 3095-96 of 1980 and the petitioners in writ petition No 8328 of 1981 filed petitions praying that the court may proceed against the State of Haryana for contempt of court. On July 29, 1985, an order was made by this court directing the respondents to give credit of the entire military service, of the petitioners in reckoning their seniority and to give them all benefits accruing thereon. The order was directed to be carried out within three months from that day. The State of Haryana has filed the present applications for reviewing our order. It is pointed out that under the rules,both prior to and after the 1976 amendment, the service for which credit could be given to ex-army personnel was the service during the period of emergency only and not any period of service subsequent to the lifting of the emergency on January 10, 1968. The submission of the State of Haryana appears to be correct. Rule 4(ii) of the Punjab National Emergency (Concession) Rules, 1965 before it was amended in 1976 said, "the period of military service mentioned in clause (i) shall be taken into consideration for the purpose of determining the seniority of a person who has rendered military service." Military service was defined by Rule 2 as follows :

"For the purposes of these rules the expression 'military service' means enrolled or commissioned service in any of the three wings of the Indian Armed Forces (including service as a Warrant Officers) rendered by a person during the period of operation of the proclamation of emergency made by the President under Article 352 of the Constitution of India on October 26, 1962 or such other service as may hereafter be declared as military service for the purpose of these rules. Any period of military training followed by military service shall also be reckoned as military service."

The words emphasised by us clearly show that it is only the service rendered during the period of emergency that could be taken into account and not any other period. No doubt there is provision for other service also being declared as military service, but no order of the Government making any such declaration has been brought to our notice. Shri Shanti Bhushan, learned counsel for the respondents, argues that earlier the Government themselves had counted the entire military service as service for the purpose of reckoning seniority but it was only after the 1976 amendment that the Government went back upon the rule which they were hitherto following and refused to give credit to service rendered after the lifting of the emergency. He invited our attention to the principal judgment ted April 26. 1984 : (reported in 1984 b IC 1015) and urged that the judg- nt also proceeded on the basis that vas the 1976 amendment that pur- rted to bring about a change. Though doubt, as urged by Shri Shanti ushan, the judgment appears to pro- ed as if the change was brought about 1976 even in regard to the length of litary service to be taken into acco- , that question was not actually cided. On the other hand in Randhir gh Dhull v. Bhambri (1981) 2 SCC 3 referring to Rule 2, it was expressly ted by this court that conecssion in gard to seniority was admissible in pect of the military service rendered ring the operation of Emergency only d not for any military service after termination of the Emergency. ri Shanti Bhushan invited our atten- n to a circular of the Government which it was said that the period of apporved military service will count for increments, seniority and pension in the civil employment. But para 4 of the very circular makes it clear that the concessions will apply in the case of all persons, who have joined or join military service during the Emergency and will be in respect of approved military service rendered during the emergency and for such period thereafter as the Government may prescribe. It is therefore, clear that military service rendered subsequent to the lifting of emergency cannot be taken into account for the purpose of reckoning the seniority in the civil post. We, therefore, review our order dated July 29, 1985 and direct that credit will be for the military service rendered up to the date of the lifting of emergency only and not the entire military service.

Petition allowed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

D. P. Madon
Judge
Supreme Court of India

OBSERVATION

(A) Constitution of India, Art. 311—Seniority—Fixation of—Mamlatdars pro-oted to posts of Deputy Collectors in 1960-62—Some of the posts though initially reated as temporary post in the cadre continuing since then—They are entitled to ave their seniority fixed vis-a-vis direct recruits on basis of continuous officiation. pl. Civil Appln. No. 1407 of 1978, D/—19-3-1980 (Guj), Reversed

(B) Constitution of India, Art. 226—Writ Petition—Principle of res judicata is pplicable even though S. 11, C. P. C. in terms does not apply (Civil P.C. (5 of 1908), . 11). (para 18)

(C) Constitution of India, Art. 141—Decision of Supreme Court—Division ench of High Court cannot sit in appeal over it—High Court should take the words n the judgment in the sense in which they were used and apply to the facts before it. (Para 19)

OBSERVED BY

R.S. Pathak, A.P. Sen and
D. P. Madon

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeals Nos. 2359 and 1816 of 1980 decided on 6-4-1986 between G. K. udani, and others, Appellant v. S D. Sharma and others, Respondents.

TEXT

Madon, J.:- On January 26, 1950, vhen the Constitution of India came nto force, under Art. 1 read with the Frist Schedule to the Constitution, In-ia became a Union of States consisting f nine Part A States, nine Part B States nd ten Part C States. Under Art. 3, arliament has the power by law to orm a new State by separation of terri-ory from any State or by uniting two r more States or of States or by uniting any territory to a part of any State; in-crease the area of any State; diminish he area of any State; alter the boundaries of any State; or alter the name of any State. By reason of repeated reorganizations of States, the Union of India today consists of twenty-two States and nine Union territories and it is difficult to visualize when this process of fragmentation of India will end and the practice of sacrificing the sense of oneness in being an Indian on the altar of parochial and linguistic chauvinism will stop. These reorganizations have resulted in benefit to some, detriment to others and bewilderment to many. Each reorganization has brought in its wake a host of problems mostly relating to those in services of the States, many of them still unsolved.

2. We are concerned in these Appeals only with the reorganization effected by the Bombay Reorganization Act 1960 (Act No. 11 of 1960), which divided the State of Bombay into the State of Maharashtra and the State of Gujarat. At the commencement of the Constitution, the territory of the State of Bombay comprised the territories which before the commencement of the Constitution were comprised in the Province of Bombay. Saurashtra was then a Part B State and Kutch a Part C State Under the States Reorganization Act, 1956 (Act No. 37 of 1956), certain territories of the State of Bombay were transferred to other states, parts of the territorites of other States were transferred to the State of Bombay and the territories of the State of Saurashtra and the Staff of Kutch were comprised in the new State of Bombay which emerged as a result of this reorganization. Part X of this Act consisting of sections 114 to 118 made provisions with respect to All-India Service and other services. Section 115 made provisions relating to other services. Under it, allotment of personnel of the State services serving in a reorganized State as existing on the date of the reorganization of States was to be made either to a successor State or to the original State in the manner provided therein.

3. Each Act providing for reorganization of States contains similar provisions. Thus, a transfer of territorie results in a transfer of service personne Those who have been so transferre have found themselves higher or lowe in seniority in the same cadre than i their original State. The question o corresponding posts and "the deeme date of appointment" has been a knott one and much administrative ingenuit has been applied in unravelling the tangle created by political expediency. Solutions to this question have resulted i giving an advantage to some in promotional matters while the hopes of promotion of others have foundered between the Scylla of political expedienc and the Charybdis of administrativ ingenuity. Subsequent reorganization involving the same States have led t these problems multiplying like Pelio piled on Ossa. The second reorganization of the State of Bombay by the Bombay Reorganization Act, 1960, has no proved an exception to this rule and th problems raised by it have reached thi Court but even the judgments of thi Court have failed to provide a fina solution as is illustrated by the presen Appeals.

4. As we are concerned in thes Appeals with services other than Al India Services; we need refer only t those provisions of the Bombay Reorganazation Act which concern these services. Sub-sections (1) to (3) and (6) o section 81 of the said Act provide a follows :

81. Provisions relating to othe services. —

(1) Every person who, immediat

before the appointed day, is serving
connection with the affairs of the
e of Bombay shall, as from that day,
visionally continue to serve in con-
tion with the affairs of the State of
harashtra, unless he is required, by
eral or special order of the Central
vernment, to serve provisionally in
nection with the affairs of the State
Gujarat.

(2) As soon as may be after the
pointed day, the Central Government
ll, by general or special order deter-
e the State to which every person
visionally allotted to the State of
harashtra or Gujarat, shall be finally
tted for service and the date with
ct from which such allotment shall
e effect or be deemed to have taken
ct.

(3) Every person who is finally
tted under the provisions of sub-
tion (2) to the State of Maharashtra
Gujarat shall, if he is not already ser-
g therein, be made avaiable for ser-
g in that State from such date as
y be agreed upon between the two
te Governments or, in default of
h agreement, as may be determined
the Central Government.

X X X X

(6) Nothing in this section shall
deemed to affect, after the appointed
, the operation of the provisions of
apter V of Part XiV of the Constitu-
n in relation to the determination
the conditions of service of persons
ving in connection with the affairs
he State of Maharashtra or Gujarat:
Provided that the conditions of
service applicable immediately before the appointed day to the case of any person provisionally or finally allotted to the State of Maharashtra or Gujarat under this section shall not be varied to his disadvantage except with the previous approval of the Central Government."

Section 82 of the said Act provides as follows :

"82. Provisions as to continuance of officers in same post.—

Every person who, immediately before the appointed day, is holding or discharging the duties of any post or office in connection with the affairs of of the State of Bombay in any area which on that day falls within the State of Maharashtra or Gujarat shall continue to hold the same post or office in that State and shall be deemed, as from that day, to have been duly appointed to the post or office by the Government of, or other appropaiate authority in, that State :

Provided that nothing in this section shall be deemed to prevent a competent authority, after the appointed day, from passing, in relation to such person, any order affecting his continuance in such post or office.'

Under Section 87, all laws which were in force in the territories of the State of Bombay prior to the coming into force of the said Act continue to apply both in the State of Maharashtra and the State of Gujarat until otherwise provided by the competent Legislature or other competent authority.

The term 'law' is defined in clause (d) of section 2 as follows :

> "(d) 'law' includes any enactment, ordinance, regulation, order, bye-law, rule, scheme, notification or other instrument having immediately before the appointed day, the force of law in the whole or in any part of the State of Bombay."

Under clause (a) of section 2 the expression "appointed day" means "the 1st day of May, 1960."

5. The dispute in these Appeals relates to the inter se seniority between direct recruits and promotes to the cadre of Deputy Collectors formerly designated as "Bombay Civil Service Executive Branch: Deputy Collectors (Upper Division)" and now designated as "Gujarat Civil Service Class II." this cadre is recognised for recruitment to the Indian Administrative Service by the relevant Recruitment Rules

6. The State of Bombay prior to its division into the State of Maharashtra and the State of Gujarat, for purpose of revenue administration, was divided into divisions which were separate units for promotional prospects, incidence of transfer, etc., of Deputy Collectors. In the predecessor Province of Bombay, the source of recruitment to these posts used to be Mamlatdars who were transferred to these posts by promotion. In 1939 a different recruitment policy was evolved and suitable candidates were directly recruited. The creation of two sources of appointment to the cadre of Deputy Collector required a rule to determine the inter se ser
ority between the promotees and t
direct recruits Accordingly, the Gov
ment of Bombay, Political & Servi
Department, issued a Resolution dat
November 21, 1941. The 19
Resolution provided as follows :

> "Government is pleased to dire
> that the following principles should
> observed in determining the seniori
> of direct recruits and promoted office
> in the provincial services (except t
> Bombay Servicss of Engineers, Class
>
> (i) In the case of direct recrui
> appointed substantively on probatio
> the seniority should be determined wi
> reference to the date of their appoin
> ment on probation.
>
> (ii) In the case of officers prom
> ted to substantive vacancies, the senio
> ity should be determined with referen
> to the date of their promotion to t
> substantive vacancies, provided the
> has been no break in service prior
> their confirmation in those vacancies."

7. Thereafter, the promotee officers th
ough their Association made a represen
ation to the Government that since dire
recruits were confirmed immediately
the expiration of their probation an
promotees were not so confirmed,
would adversely effect their prospects
promotion. By its reply dated Janua
11, 1949, the Government replied
the said Association as under :

> "Confirmation of direct recruits t
> the cadre Collectors :
>
> The officers appointed by direct r
> cruitments and those appointed b
> promotion are confirmed in vacanci

erved for their respective classes. If, refore, a clear vacancy in the cadre Deputy Collectors reserved for dir- recruit occurs earlier, it is natural t such a recruit should be confirmed lier. The seniority of such a direct ruit vis-a-vis a promoted officer is , however, determined according to principles laid down in Govern- nt Resolution, Political and Services partment No. 4283/34 dated the 21st vember 1941 i e. with reference to date of first appointment on proba- n in the case of direct recruits and continuous offication in the case of promoted officers. The promo- d officers, therefore, can have no evance in this behalf"

8. From 1950 until 1959 the eme of direct recruitment to the lre of Deputy Collectors was adand- ed but it was again revived in 1959 a Resolution dated July 30, 1959, ued by the Government of Bombay, venue Department The said Reso- ion was as follows :

"Government had for sometime der consideration the question of re- ing the system of direct recruitment the cadre of Deputy Collectors It s now been decided that in the inter- of administration the revival of that stem is quite necessary. Government accordingly pleased to cancel the or- rs contained in Government Resolu- n No. 9313/45, dated 6th February, 50 and those in Government Resolu- n No. 9313/45, dated the 24th July, 51, in so far as they relate to the recruitment of Bombay Civil Service Executive Branch Deputy Collectors (Upper Division) and to direct that, as far as practicable, 50 per cent of the substantive vacancies occurring in the cadre with effect from 1st January, 1959 should be filled in by nominiation of candidates to be selected in accordance with the rules appended herewith.

2. The Political and Services Department should be requested to issue necessary correction slips to the Bombay Civil Services. Classification and Recruitment Rules."

The rules appended to the said Resolution dated July 30, 1959, were called the "Recruitment Rules for the Posts of Deputy Collectors". Rule 1 is as follows :

"Appointment to the posts of Deputy Collectors shall be made either by nomination or by promotion of suitable Mamlatdars :

Provided that the ratio of appointment by nomination and by promotion shall as far as practicable be 50 : 50: ;

Provided further that the vacancies reserved for appointment by promotion shall be filled by directly recruited Mamlatdars who have put in at least seven years service in the posts including the period sent on probation."

Rule 2 provided for appointment by nomination. Such nomination was to be made on the result of a competitive examination to be held by the State Public Service Commission in accordance with the rules in respect thereof appended as Annexure I to the Recruitment Rules. The said Rule 2 also prescribed the qualifications for candidates desiring to appear in the said examination. Amongst the qualifications so prescribed was that the candidates should "possess adequate knowledge of Marathi or Gujarati". Rules 3 and 4 of the Recruitment Rules were as follows :

"3. Candidates appointed by nomination shall be on probation for a period of two years, the probation being regulated according to the rules appended hereto as Annexure II.

4. After appointment as Deputy Collector, whether by nomination or by promotion, the selected candidate will have to pass the prescribed examinations in Hindi and in a regional language according to the prescribed rules."

9. Following upon the reorganization of the States, Revenue Divisions were abolished and by a Circular of the Government of Bombay dated February 3, 1960, the legal fiction of "deemed dates on the commencement of service" for the purpose of inter se seniority of personnel drawn from different pre-reorganization States and from the Divisions was abolished The Circular applied to all the services and consequently the cadre of Deputy Collectors stood converted into a State-wide cadre. On the State of Gujarat coming into existence a similar notification was issued by the Government of Gujarat on May 1 1960. Thereafter, the Government of Gujarat issued another circular dated May 27, 1960. The said circular is as follows :

"Doubts have arisen as respects the directions given under Government Circular No. GSF-1060 dated the 1st May, 1960.........To remove any doubt in that behalf, therefore, Government is pleased to direct that the following Explanation shall be and shall be deemed always to have been added to the said circular namely—

Explanation.— Nothing herein shall apply to appointments of officers, authorities or persons or to the constitution of tribunals or other bodies which may be made by Government on or after the 1st May, 1960 and the conditions of service of the officers, authorities or persons appointed or the members of the Tribunals or bodies so constituted."

Until then the select list of Mamlatdars fit to be appointed as Deputy Collector used to be prepared on the basis of divisional seniority in their respective Divisions. In Ramchandra Shankar Deodhar v State of Maharashtra, (1974) 2 SCR 216 : (AIR 1974 SC 259) the second proviso to Rule of the recruitment Rules was held by this Court to be void as being violative of Art. 16 of the Constitution In that case this Court further held that the procedure for promotion based on divisional seniority was also violative of Art. 16 and that the State should read just seniority according to State-wide seniority.

10. During the period 1960 to 1962 no direct recruits were appointed to the post of Deputy Collectors, but sixty-one

mlatdars were promoted to that
t. The reason why no direct recruit-
its were made during this period was
t on October 31, 1961, the Govern-
it sent requisition for twelve posts
Deputy Collectors to the Gujarat
lic Service Commission but the Co-
ission raised certain queries
h regard to the qualification pres-
bed by clause (c) of Rule 2 of the
cruitment Rules that the candidate
uld possess an "adequate knowledge
Marathi or Gujarati". The reason
this query was that on the reorgani-
on of the State of Bombay, the State
Gujarat which came into being con-
ed of those areas of the State of
nbay which were predominantly
jarati-speaking areas while the State
Maharashtra consisted of the territo-
of the State of Bombay of which
predominant language was Marathi
the City of Bombay of which Mar-
i was not the predominant language.
nsiderable correspondence took place
ween the Commission and the Gove-
nent. Ultimately, a competitive
mination for the posts of Deputy
llectors was held in July 1962. The
ults of this examination were declar-
in January 1963 and the Commission
t its recommendations in February
53. The Government thereupon issued
lers for appointment of the candidat-
so selected by the Public Service
mmission in May 1963. Thus, in
53 and later the direct recruits came
be appointed. The Government of
jarat issued on December 12, 1971, a
iority list as on January 1, 1971. The
list of the promotees was prepared on the basis of their continuous length of service and the list of the direct recruits was prepred on the basis of the dates of their respective appointments A combined seniority list showing seniority inter se between the promotees and the direct recruits was also prepared. It may by mentioned that ever since 1941 in the Province of Bombay and thereafter in the State of Bombay and subsequently in the State of Gujarat the principle of continuons officiation had been admittedly followed. The direct recruits filed a writ petition in the Gujarat High Court being Special Civil Application No. 1401 of 1973 challenging the said seniority list. The parties, apart from the State of Gujarat, namely the promotees and the direct recruits, were arranged in a representative capacity in the said writ petition. The grievance of the direct recruits was that the promotees who were promoted during the period 1960 to 1963 were given seniority over those directly recruited in 1963 and later. It was their contention that as the appointments to the cadre of Deputy Collectors were made on the basis of a quota allocation, a system of rotation should also apply A learned single Judge of the Gujarat High Court by his judgment dated November 30, 1973, dismissed the said writ petition holding that Rule 1 of the Recruitment Rules required implentation of the quota as fer as it was practicable and, therefore, the promotions of Mamlatdare made between 1961 and 1963 were regular. The direct recruits thereupon

filed a Latters Patent Appeal being Letters Patent Appeal No 113 of 1974. In the said Letters Patent Appeal the direct recruits contended that the promotees had not been appointed in substantive vacancies, but were appointed in such vacancies only on the date on which they were confirmed. By its judgment dated November 12, 1975, the Division Bench of the Gujarat High Court held that the Government ought to have followed the roster method. The promotees thereupon approached this Court in appeal. During the pendency of the appeal, on January 1, 1976, the Government prepared a seniority list on the basis of the judgment of the Divison Bench. By its judgment delivered on November 1, 1976, and reported as N K. Chauhan v. State of Gujarat, (1977) 1 SCR 1037 : this Court partly allowed the said appeal filed by the promotees.

11. In Chauhan's case the Court accepted the explanation given by the State of Gujarat for its inability to hold the examination. The Court summarized the conclusions it had reached as follows (at page 1053) 'of SCR) :

"1. The promotions of mamlatdars made by Government between 1960 and 1962 are saved by the as far as practicable' "proviso and therefore valid. Here it falls to be noticed that in 1966 regular rules have been framed for promotees and direct recruits flowing into the pool of Deputy Collectors on the same quota basis but with a basic difference. The saving provision 'as far as practicable' has been deleted in the 1966 rules. The consequence bears upon seniority even if the year is treated as the unit for quota adjustment.

2. If any promotions have been made in excess of the quota set apart for the mamlatdars after rules in 1966 were made, the direct recruits have a legitimate right to claim that the appointees in excess of the allocable ratio from among mamlatdars will have to be pushed down to later years when their promotions can be regularised by being absorbed in their lawful quota for those years. To simplify, by illustration, if 10 deputy collectors' substantive vacancies exist in 1967 but 8 promotees were appointed and two direct recruits alone were secured, there is a clear transgression of the 50 : 50 rule. The redundancy of 3 hands from among promotee cannot claim to be regularly appointed on a a permanent basis. For the time being they occupy the posts the only official grade that can be extended to them is to absorb them in the subsequent vacancies allocable to promotees. This will have to be worked out down the line wherever there has been excessive representation of promotees in the annual intake........

3. The quota rule does not, inevitably invoke the application of the rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and those deficient vacancies have been fiiled up by promotees, later direct recruits cannot claim deemed' dates of appointment for seniority in

vice with effect from the time, accor- g to the rota or turn, the direct ruits' vacancy arose. Seniority will pend on the length of continuous ciating Service and cannot be upset later arrivals from the open market e to the extent to which any excess motees may have to be pushed down indicated earlier."

(Emphasis supplied.)

After discussing the case law, the urt then summed up the further con- sions it had reached and gave the quisite directions for reframing the er se seniority list. These conclus- ns and directions are as follows (at ges 1057-58) (SCR) :

"(a) The quota system does not cessitate the adoption of the rotatio- l rule in practical application. Many ys of working out 'quota' prescrip- n can be devised on which rota is tainly one.

(b) While laying down a quota en filling up vacancies in a cadre m more than one source, it is open Government, subject to tests under t. 16, to choose 'a year' or other riod of the vacancy by vacancy basis work out the quota among the sour- s. But once the Court is satisfied, amining for constitutionality the met- od proposed, that there is no invalid- y, administrative technology may have ee play in choosing one or other of e familiar processes of implementing e quota rule. We, as Judges, cannot rike down the particular scheme be- use it is unpalatable to forensic taste.

(c) Seniority normally is measured by length or cantinuous, officiating service—the actual is easily accepted as the legal This does not preclude a different prescription, constitutionality tests being satisfied.

(d) A periodisation is needed in the case to settle rightly the relative claims of promotees and direct recruits. 1960-62 forms period A and 1962 onwards forms period B Promotees regularly appointed during period A in excess of their quota, for want of direct recruits (reasonably sought but not secured and because tarryiny longer would injure the administration) can claim their whole length of service for seniority even against direct recruits who may turn up in succeeding periods.

(e) Promotees who have been fitted into vacancies beyond their quota during the period B—the year being regarded as the unit--must suffer survival as invalid appointees acquiring new life when vacancies in their quota fall to be filled up. To that extent they will step down, rather be pushed down as against direct recruits who were later but regularly appointed within their quota."

(Emphasis supplied).

12 Thereafter, on January 19, 1978, the Government of Gujarat prepared a seniority list pursuant to the directions given by this Court in Chauhan's Case. There upon, in March 1978 the direct recruits filed a writ petition in the Gujarat High Court being Special Civil Application No. 1907 of 1478 chllenging the said

seniority list dated January 19, 1978. This writ petition was also filed in a representative capacity and the parties thereto are the same as in the earlier writ petition, namely, Special Civil Application No. 1401 of 1972, save that as N.K. Chauhan had retired, G.K. Dudani has been joined as a party in his place. The main contention of the directs recruits in the said Special Civil Application No. 1407 of 1978 was that there were only thirty substantive vacancies in the permanent strength of the Deputy Collectors, cadre and the balance of thirty-one vacancies was in the temporary posts created by the State Government or ex-cadre posts and consequently the thirty-one promotees could not be deemed to be "regularly appointed" as required by direction 'd' given in Chauhan's Case

13. In October 1978 the promotees also filed a writ petition in the Gujarat High Court, being Special Civil Application No. 2199 of 1978, challenging the said seniority list of January 19, 1978, raising two contentions. The first contention was that quota was not distributed on the basis of actual or utilized vacancies but only the filled-up vacancies of the officers who had continued to officiate till retirement or death. The second contention was the appointment of junior time-scale I. A. S. officere in the cadre of Deputy Collectors was irregular because the relevant rule prescribed only two sources of recruitment, namely, promotion from lower rank and direct recruitment. We may mention that the second cometntion raised by the promotees was given up as it transpired at the hearing of the said writ petition that the junior time-scale I A S. officers were appointed to the posts of Assistant Collector and not to the posts of Deputy Collector, and even a Deputy Collector after he was nominated to the I. A. S was appointed as an Assistant Collector.

14. Both the said writ petitions were heard together by a Division Bench of the Gujarat High Court. Accepting the above contention of the direct recruits, the Division Bench of that High Court observed that the officers promoted during period A to the posts of Deputy Collectors fell in four categories, namely,

(i) Promotees appointed to substantive vacancies in the cadre of Deputy Collectors

(ii) Promotees appointed to hold ex-cadre posts

(iii) Promotees appointed to temporary posts, cadre posts ex-cadre posts.

(iv) Promotees who were first placed on conditional select list during period A and were placed on unconditional select list after their performance was found satisfactory.

15. So far as the first category is concerned, it was conceded by the direct recruits at the hearing of the said writ petitions and in our opinion, rightly so, that promotees falling under that category in excess of their quota would be senior to subsequently appointed direct recruits in accordance with their length of continuous officiating service. So

as the last category is concerned, Division Bench rejected the contentof the direct recruits and observed Mamlatdars were placed on a cononal select list and were appointed iold the posts of Deputy Collector if their performance was found satctory during the trial period, they ild be confirmed in those posts and such confirmation had nothing to with the length of continuous officig service of such Mamlatdars. The ision Bench held, and in our opinrightly, that it was the placement the Mamlatdars on the select list ch was material. This finding of Division Bench is not challenged in Appeal before us filed by the direct uits.

16. The only dispute before us, efore, revolves round the second the third categories. According to Division Bench, the question which for consideration which respect to se categories was whether the expren "promotees regularly appointed" l in the said direction (b) in Chauh- meant a regular appointment in the ılar course to a cadre post as contrainguished from ad hoc appointment appointment to an ex cadre post. cording to the Division ıch, the expression "promotees ılarly appointed during per- A in excess of their quota" had a ect reference to promotees regularly ointed in substantive vacancies ch occurred in the cadre of Deputy lector between 1960 and 1962. Acding to the Division Bench, the concept of regular appointment which was laid down in Chauhan's Case was indissolubly wedded to the said Government Resolution of 1959 read with the said Government Resolution of 1941 and, therefore, to read the said direction independently of the said two Resolutions was to decree an artificial and unnatural divorce between them. The Division Bench held, "Therefore, regularity of appointment is not any regularity which our forensic tests may warrant but it is the regularity in terms of those RESOLUTIONS." The High Court further held that reading the principle laid down in the direction (d) in the light of the said Government Resolution of 1959, promotees appointed in substantive vacancies which occurred in the cadre of Deputy Collectors during period A in excess of their quota could alone gain seniority over the direct recruits in terms of the principle of the length of continuous officiating service and that those who were promoted to the posts of Deputy Collectors for being appointed to ex-cadre posts could not be said to be regularly appointed because their appointments were not in substantive vacancies in terms of the said Government Resolution and that the seniority of those who were so promoted had to be determined from the date on which they were appointed to fill the substantive vacancies in the cadre of Deputy Collectors. The High Court then proceeded to consider the case of those who were promoted to the posts of Deputy Collectors for being appointed

to hold temporary posts. According to the Division Bench, they could not be said to have been "regularly appointed" within the meaning of the decision in · Chauhan's Case. The Division Bench observed :

> "A temporary post and a substantive vacancy go ill together. There can be a substantive post and a temporary vacancy but it is difficult for us to think that there can be a substantive vacancy in a temporary post. The very fact that the post is temporary militates against there being a substantive vacancy in that post. We are, therefore, of the opinion that the Mamlatdars who were, during period A, promoted to the posts of Deputy Collectors and appointed to hold temporary posts could not claim seniority in terms of the length of their continuous officiating service from the date or dates of such promotions. They can claim seniority in the cadre of Deputy Collectors only from the date or dates from which they were appointed to the posts of a Deputy Collector in substantive vacancies in the cadre of Deputy Collectors."

17. In our opinion, it was not open to the direct recruits to contend in their Special Civil Application No. 1407 of 1978 that promotees appointed to hold ex-cadre posts and temporary posts, whether cadre posts or ex-cadre posts, were not regularly appointed during period A and the High Court after perusing Chauhan's Case (AIR 1977 SC 251) was in error in permitting them to raise this contention This contention had been raised by the direct recruits in their earlier writ pe tion namely, Special Civil Applicatio No. 1401 of 1972. The learned Singl Judge had rejected this contention an had held that the appointments of th promotees between 1961 and 1963 wer regular. Though this point was take in the Memorandum of Appeal in th Letters Patent appeal filed by the direc recruits, the Division Bench whic heard this appeal did not disturb thi finding nor was this finding upset i Chauhan's case. On the contrary, i Chauhan's Case this Court observe (of 1977(1) SCR):

> "In the instant case it is commo ground that the appointments are no on a purely at ad hoc basis but hav been regularly made in accordanc with the rule to fill substantiv vacancies except that the promotees have exceeded their quot direct recruits being unavailable."

18. In view of this categorica finding in Chauhan's Case, it was no open to the direct recruits to reagitat this point. Although by reason of th Explanation which was inserted in Section 141 of the Code of Civil Procedure 1908, by the Code of Civil Procedur (Amendment) Act, 1976, Section 11 o the Code dose not in terms apply to an proceeding under Article 226 of th Constitution, the principle of res judiciata does apply to all writ petition under Article 226. This point was, therefore, barred by the principle of re judicata and should never have been allowed by the High Court to be reagitated.

19. Even apart from the question es judicata, the Division Bench was right in its approach to Chauhan's e. The interpretation placed by the ision Bench upon the words "prom-es regularly appointed" in direction in Chauhan's Case was wholly oneous. Under the guise of inter-ting the judgmeht in that case, the ision Bench of the High Court virt-y sat in appeal over the judgment of Court and modified it. The High urt ought to have taken the words in t judgment in the sense in which they e used and ought to have applied m to the facts before instead of try- to put words in the mouth of this urt. The Division Bench ignored fact that this Court had categorical-ield that in the case before it the pointments had been regularly made accordance with the rules to fill sub-ntive vacancies. According to the ision Bench, direction (d) in Chau-'s Case meant that these appoint-nts should be regularly made only to vacancies in the permanent posts the cadre and did not apply to prom-ees appointed to hold ex-cadre posts. e record shows that during period A ere were thirty vacancies in perman-t posts and thirty-one vacancies in nporary additional posts These irty-one posts were created initially r a period of one year but renewed om year to year from 1960 onwards d have been in existence continuously ce them. The temporary addition- posts were, therefore, not fortuitous sts created for the purpose of special tasks but formed an integral part of the regular cadre, and appointments to those posts were made from the approved select list of Mamlatdars prepared in consultation with the Gujarat Public service Commission. The mode of appointment to these posts was to appoint first a particular officer to the cadre post of Deputy Collector and to continue him as Deputy Collector or depute him to other Departments in equivalent posts. Rule 9 (8) of the Bombay Civil Service Rules, 1959, defines "cadre" as meaning the strength of a part of service sanctioned as a separate unit". The service of Deputy Collectors is admittedly a separate unit under the Revenue Department. A cadre consists of permanent posts and temporary posts added to the cadre from time to time according to the exigencies of the service. The difference between permanent and temporary posts is brought out by the definition of these expressions given in Rule 9. Under Rule 9 (43), a permanent post is a post carrying a definite rate of pay sanctioned without limit of time and under Rule 9 (56) a temporary post is a post carrying a definite rate of pay sanctioned for a limited time. Rule 71 sets out the manner of fixation of pay of the officer appointed to a temporary post. The note below Rule 8 is illuminative and is as follows :

"Substantive appointments to temporary posts should be made in a limited number of cases only, as for example, when posts are, to all intents and purposes, quasi permanent or when they have been sanctioned for a period of not less than, or there is reason to believe that they will not terminate within, a period of three years. In all other cases, appointments in temporary posts should be made in an officiating capacity only".

Instruction No 3 to Rule 71 is also illuminative, it provides as follows :

"Temporary posts may be divided into the categories (i) posts created to perform the ordinary work for which permanent posts already exist in a cadre the only distinction being that the new posts are temporary, and not permanent and (ii) isolated post created for the performance of special tasks unconnected with the ordinary work which a service is called upon to perform An example of the latter type of post is on a commission of enquiry A distinction by strict verbal definition is difficult, but in practice there should be little difficulty in applying the distinction in individual cases. The former class of post should be considered as a temporary addition to the cadre of a service whoever may be the individual appointed to the post. The latter class of temporary posts should be considered as unclassified and isolated Ex-cadre posts. Temporary posts which by this criterion should be considered as temporary addition to the cadre of a service should be created in the time-scale of the service ordinarily without extra remuneration. Incumbents of these posts will, therefore, draw their ordinary time-scale pay."

This is precisely what has been done
in the casc of officers whom the Divi
on Bench has categorized as promote
appointed to hold ex-cadre posts
promotees appointed to a tempora
post, whether an ex-cadre post or
cadre post. Even officers holding pe
manent posts are often deputed to ho
an ex-cadre posts. It was, therefor
immaterial whether promotees after b
ing appointed Deputy Collectors we
deputed to hold an ex-cadre post or no
The position that a temporary post ca
be held in a substantive capacity is no
firmly established by decisions of th
Court in Baleshwar Dass v. State
U P. (1981) 1 SCR 449; an
O. P. Singla v. Union of Ind
(1984) 4 SCC 450. According
these decisions, all persons holdir
substantive posts or tempora
posts in substantive capacity a
members of the service. In Singla
case this Court further pointed o
"A person can be said a post, pe
manent or temporary, in a substantiv
capacity only if his appointment t
that post is not fortuitous or ad hoc.
The judgment in Chauhan's Ca
is clear on the point that the appoin
ment of none of the promotees i
question was a fortuitous or an ac
hoc appointment. Further, copies c
the relevant Gazette notifications hav
been produced in these Appeals whic
clearly bear out not only this fact bu
also show that the appointments c
these promotees were regularly made

20. The judgment of Divisio
Bench, in so far as it held that 'prom

es appointed to ex-cadre posts" and
romotees appoined to temporary
sts, cadre posts or ex-cadre posts"
re not regularly appointed during
riod A and, therefore, were not cove-
d by direction (d) in Chouhan's case,
s clearly wrong and is hereby
versed.

21. Civil Appeal No. 2359 of 1980
filed by the promotees and is directed
ainst the judgment and order of the
vision Bench of the Gujarat High
ourt making the rule issued by that
gh Court in Special Civil Application
o. 1407 of 1978 filed by the direct re-
uits absolute and dismissing Special
vil Application No. 2199 of 1978 filed
the promotees. So far as that part
the said Appeal which is directed
ainst dismissal of Special Civil Appli-
tion No. 2199 of 1978 is concerned,
e two contentions which were raised
fore the High Court and which have
en set out above were also raised be-
re us. The promotees had given up
the High Court the first contention
lating to the appointment of junior
me-scale I.A.S. officers in the cadre of
eputy Collectors and it is now not
pen to them to raise this contention.
o far as the second contention is con-
erned, it is the case of the promotees
at in addition to thirty vacancies in
ermanent pots and thirty-one in tem-
orary additional posts, there were nin-
teen further vacancies, mrking in all
ighty vacancies. The submission of the
romotees before as was that this Court
hould direct the Government of Guja-
at to prepare a fresh seniority list and
to give the promotees the benefit of these further nineteen vacancies also. The State of Gujaraf has categorically stated both in its affidavit in reply filed in the Gujarat High Court as also in its affidavits filed in this Court that there were in all only sixty-one vacancies. The contention of the promotees that there were nineteen fruther vacancies does not seem to be correct as the record bears out the above statement made by the State of Gujarat, and after this lengthof time it is not necessary to remit this matter to the High Court to ascertain this fact or to direct the State Government to prepare a fresh seniority list. This litigation has gone on too long and there must be a rest and quietus to all things. In our opinion, Special Civil Application No. 2199 of 1978 filed by the promotees was rightly dismissed by the Division Bench.

22. In the result, we partly allow Civil Appeal No. 2359 of 1980 and while confirming the order of the Gujarat High Court dismissing Special Civil Application No. 2199 of 1978, we set aside its order making absolute the rule issued in Special Civil Application No. 1407 of 1978 and dismiss the said Special Civil Application.

23: Civil Appeal No. 1816 of 1980 is filed by the State of Gujarat against the order of the Division Bench of the Gujarat High Court in Special Civil Application No. 1407 of 1978 filed by the direct recruits. This Appeal is accordingly allowed.

24 All interim orders passed in both these Appeals are hereby vacated.

D. P. Madon
Judge
Supreme Court of India

25. The real result of this prolonged and unfortunate litigation is that most of the promotees have retired from service and only a few are felt to enjoy the fruits of their victory in the concrete shape of being able hereafter to fill a higher post in the Indian Administrative Service. Their misfortune was due to the inability of the Government of Gujarat to hold a competitive examination for nominating direct recruits to the posts of Deputy Collector because of the query raised by the Gujarat Public Service Commission with respect to the particular varnacular language of which the candidate was expected to possess an adequate knowledge, namely, whether is should be Gujarati or either Marathi or Gujarati. This query would not have been raised had what was then called the bilingual State of Bombay not been bifurcated into two socalled unlingual States. Those who have retired have, however, had the honour of being sacrificial lambs on the altar of the God of Linguistic States and can console themselves with the knowledge that the local, and in a large measure even the State, administration of their State has after the division of the old State been carried on in the motheretongue of the residents of the new State. It is time we lifted the Language Curtain which has descended criss-cross across India so that an Indian can understand another Indian St. Paul said in his First Epistle to the Corinthians (xiv. 11), "Therefore if I know not the meaning of the voice, I shell be unto him that speaketh a barbarian, and he that speaketh shall be a barbarian unto me." Let us then have a common tongue, whatever it be. We may take pride in our mothertongue. We may take pride in the locality, town or region from where we come. But let us above all prides take pride in being Indians.

26. The parties will bear and pay their own costs of these Appeals

Order accordingly.

Report No. 31, p. 01

M. P. Thakkar
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Arts. 311, 14–Gratuity–Provision for payment of larger amount with prospective effect from specified date—Does not offend Art 14.

OBSERVED BY

M. P. Thakkar and B. C. Ray
Hon'ble Judges Supreme Court of India.

IN

Special Leave Petn. (Civil) Nos 14179-80 of 1985 decided 25-7-1986, between State Government Pensioners' Association and others, Petitioners v. State of Andhra Pradesh, Respondent.

TEXT

Thakkar, J:— Does that part of the provision which provides for payment of a larger amount of gratuity with prospective effect from the specified date offend Art. 14 of the Constitution of India? Whether gratuity must be paid on the stepped up basis, to all those who have retired before the date of the upward revision, with retrospective effect, even if the provision provides for prospective operation, in order not to offend Art. 14 of the Constitution of India? A Division Bench of the High Court of Andhra Pradesh says 'no'. In our opinion it rightly says so. The petitioners, erstwhile Government employees who had retired "before" April 1, 1978, inter alia claimed and contended before the High Court that they were entitled to the benefit of the Government order No. 88 dated 26th March, 1980 providing that :

"(b) Retirement gratuity may be 1/3rd of pay drawn at the time of retirement for every 6 monthly service subject to maximum of 20 months pay limited to Rs. 30,000/- "

The said order in so far as gratuity is concerned is made effective from 1st April, 1978 Says the High Court:—

"Therefore, we are now only concerned whether this G.O. Ms. No. 88 dated 26-3-1980, should be made applicable to the pensioners that retired prior to 1-4-1978 by revising their gratuity payable to them. The learned Advocate-General, contends, that gratuity is something different from the other pensionary benefits like the pension and the family pension, which are continuing ones. The Gratuity that accrued to the petitioners prior to 1-4-1978 was calculated on the then existing Rules and paid. In that way, the pensioners retired prior to 1-4-1978 will form themselves into a distinct class for purposes of the payment of benefit of gratuity from the others that retired after 1-4-1978, from which date, the revised pension rules are made to be applied by the Government. On the other hand, it is the contention of the writ petitioners that gratuity is a part and parcel of the pensionary benefits and the same cannot be looked at separately from the other pensionary reliefs. The learned counsel for the Writ Petitioners, no doubt, cited two decisions V. P. Gautama, IAS Retd. v. Union of India, (1983) 2 Serv. LR 346 : (1984 Lab IC 154) (Punj. & Har.) and M.P. Tandon v. State of U.P. 1984 Lab IC 677 (All), where their Lordships that decided the above two cases, held, that no distinction can be made in the pensionary benefits including death-cum-retirement gratuity benefit between the pensioners that retired prior to the stipulated date and after the stipulated date.

In the decision D. S. Nakara. v. Union of India, AIR 1983 SC 130, their Lordships of the Supreme Court enunciated the principle as follows :

With the expanding horizons of socio-economic justice, the Socialist Republic and Welfare State which the country endeavours to set up and the fact that the old men who retired when emoluments were comparatively low are exposed to vegaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, by introducing an arbitrary eligibility criterion, 'being in service and retiring subsequent to the specified date' for being in service and retiring subsequent to the specified date' for being eligible for the liberalised pension scheme and thereby dividing a homogeneous cla the classification being not based any discernible rational principle a being wholly unrelated to the obje sought to be achieved by grant liberalised pension and the eligibili criteria devised being thoroughly arb rary, the eligibility for liberalised pe sion scheme of "being in service the specified date and retiring subs quent to that date" in the memoran Exs. P 1 and P 2, violated Art and is unconstitutional and liable to struck down."

After thus enunciating the prin ple their Lordships have taken care observe as follows :—

"But we make it abundantly cle that arrears are not required to be ma because to that extent the scheme prospective."

In our opinion, the arrears rel ting to gratuity benefit comput according to the Revised Pension Rul of 1980 may not be paid to the pens oners that retired prior to 1-4-19 because at the time of retirement th were governed by the then existi Rules and their gratuity was calculat on that basis. The same was pai Since the revised scheme is operati from the date mentioned in the schem i. e 1-4-1978, the continuing rights the pensioners to receive pension an family pension must also be revis according to that scheme But t same cannot be said with regard gratuity, which was accrued and draw The reason why their Lordships of t Supreme Court in Nakara's case (AI

1983 SC 130) refused to grant arrears to the pensioners that retired prior to the stipulated date would ipso facto apply for refusing to grant the revised gratuity since that would amount to asking the State Government to pay arrears relating to gratuity after revising them according to the new scheme for those that retired prior to 1-4-1978 and that would amount to giving retrospective effect to the A.P. Revised Pension Rules, 1980, which came into effect from 29-10-1979 and in the case of Part II of those Rules from 1-4-1978. The scheme is prospective and not retrospective.

Moreover, we must remember that when the State Government appointed the pay revision Commissioner to review the then existing scales of pay under G.O.Ms. No. 745, General Administration (Spl A) Department, dated 3-11-1978, the Pay Revision Commissioner was asked to take into account while making his recommendation, the economic conditions in the State, the financial implications of his recommendations, and the impact thereof on the resources available for the plan other essential non-plan expenditure. Surely, the Pay Revision Commissioner, when he made his recommendations to revise the pensionary benefits, is not contemplating to make his recommendations retrospective. Otherwise, he would have taken financial implications of those recommendations and the impact thereof on the resources available for plain and other essential non-plan expenditure of the State. For this reason also, we cannot direct the State Government to revise the gratuity benefit, which was already paid to these petitioners who retired prior to 1-4-1978. The Supreme Court has clearly stated in Nakara's case that arrears are not required to be paid because to that extent the scheme is prospective. Similar is the case with regard to the case of gratuity that was accrued and paid prior to the stipulated day mentioned in the G.O. promulgating the Revised Pension Rules of 1980."

2. We fully concur with the view of the High Court. The upward revision of gratuity takes effect from the specified date (April 1, 1978) with prosepective effect. The High Court has rightly understood and correctly applied the Principle propounded by this Court in Nakara's case AIR 1983 SC 130. There is no illegality or unconstitutionality (from the platform of Article 14 of the Constitution of India) involved in providing for prospective operation from the specified date. Even if that part of the Notification which provides for enforcement with effect from the specified date is struck down the provision can but have prospective operation-not retrospective operation. In that event (if the specified date line is effaced), it will operate only prospectively with effect from the date of issuance of the notification since it does not retrospectively apply to all those who have already retired before the said date. In order to make it retrospective so that it applies

to all those who retired after the commencement of the Constitution on 26th January 1950 and before the date of issuance of the notification on 26th March, 1980, the Court will have to re-write the notification and introduce a provision to this effect saying in express terms that it shall operate retrospectively. Merely striking down (or effacing) the alleged offending portion whereby it is made effective from the specified date will not do. And this, the Court cannot do Besides, giving prospective operation to such payments cannot by any stretch of imagination be condemned as offending Art. 14 An illustration will make it clear. Improvements in pay scale by the very nature of things can be made prospectively so as to apply to only those who are in the employment on the date of the upward revision. Those who were in employment say in 1950, 1960 or 1970, lived, spent, and saved, on the basis of the then prevailing cost of living structure and pay-scale structure, cannot invoke Art. 14 in order to claim the higher pay scale brought into force say, in 1980. If upward pay revision cannot be made prospectively on account of Art. 14, perhaps no such revision would ever be made. Similar is the case with regard to gratuity which has already been paid to the petitioners on the then prevailing basis as it obtained at the time of the respective dates of retirement The amount got crystalized on the date of retirement on the basis of the salary drawn by him on the date of retirement. And it was already paid to them on that footing. The transaction is completed and closed. There is no scope for upward or downward revision in the context of upward of downward revision of the formula evolved later on in future unless the provision in this behalf expressly so provides retrospectively (downward revision may not be legally permissible even). It would be futile to contend that no upward revision of gratuity amount can be made in harmony with Art. 14 unless it also provides for payment on the revised basis to all those who have already retired between the date of commencement of the Constitution in 1950, and the date of upward revision. There is therefore no escape from the conclusion that the High Court was perfectly right in repelling the petitioners' plea in this behalf. For the sake of record we may mention that our attention was called to an order of a Division Bench of the High Court of Gujarat LPA 280 of 1933 dated 8-9-83 per P.D. Desai Acting CJ which does not discuss the issues involved but is based on a concession said to have been made by the Advocate General who appeared for the State. And also to a decision of the Allahabad High Court M P. Tandon v. State of U P. 1984 Lab IC 677 and Punjab and Haryana High Court V.P. Gautama v Union of India, (1984) 1 Sery LJ 120. In none of these decisions the relevant passage from Nakara's case (AIR 1983 S.C. 130) was considered. Nor was the aspect regarding prospec-

M. P. Thakkar
Judge
Supreme Court of India

ve operation considered on principle. ne High Court considered it shocking d was carried away by the fact that employee who retired even one day efore the enforcement of the upward vision would not get the benefit if the ecified date of enforcement was not facted by striking down the relevant ovision. But in all cases of prospec- ve operation it would be so Just as ne who files a suit even on day after e expiry of limitation would lose his right to sue, one who retires even a day prior to enforcement of the upward revision would not get the benefit. This cannot be helped, there is nothing shocking in it unless one can say legislation can never be made prospective, and nothing turns on it. These are the reasons which impelled us to dismiss the Special Leave Petition on 18th July, 1986.

Order accordingly.

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Report No. 32, p. 01

A. P. Sen
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art 32—Writ petition—Allotment of Maruti Vehicles out of manufacturers' quota of five per cent—Guidelines regulating such allotment laid down by Supreme Court.

OBSERVED BY

V. D. Tulzapurkar and A P, sen,
Hon'ble Judges Supreme Court of India.

IN

Writ Petn (Civil) Nos. 588 and 11716 of 1984, decided on 7-3-1986, between Ashok Kumar Mittal, Petitioner v. Maruti Udyog Ltd. and another, Respondents.

With

VOICE (Voluntary Organisation in the Interest of Consumers Education) and another, Petitioners v. Maruti Udyog Ltd and another, Respondents,

TEXT

ORDER :— We have heard Mr. Soli J. Sorabjee, Mr. Prashant Bhushan and Mr. R. Karanjawala for the petitioners and the learned Attorney General on behalf of the respondents, Various submissions were made on behalf of the parties. After considerable discussion of the various proposals and suggestions made by parties and after having given our anxious and deep consideration to the matter it is ordered that in public interest the following guidelines should regulate the allotment of Maruti-Vehicles out of the manufacturers' quota of 5 per cent.

2. The allotment of Maruti vehicles out of the manufacturers' quota of five per cent will be made in favour of the following categories only.

1. Any organisation / institution coming within the definition of 'State' under Art. 12 of the Constitution of India.

II. Any hospital or recognised charitable organisation or educational institutions registered or incorporated under a statute or having recognition under S. 80-G of the Income-tax Act, 1961.

III. Individuals

(a) An individual suffering from physical handicap so as to render him incapable of using public transport would be eligible for allotment provided his income together with the income of his or her spouse or his or her guardian does not exceed Rs. 60,000/- per year.

(b) The President of India, Vice-President of India, Cabinet Ministers,

Ministers of State in the Union Cabinet and Governors of States and Cabinet Ministers in State Governments, the Chairman of the Public Service Commission, the Chief Election Commissioner, the Auditor and Comptroller General of India and the Attorney Gneneral of India.

(c) The Speaker and the Deputy Speaker of the Lok Sabba, the Chairman and the Deputy Chairman of the Rajya Sabha, Speakeres of State Legislative Assemblies, Chairpersons of State Legislative Councils, and Leaders of Opposition parties in Parliament and in the State Legislatures.

(d) The Chief Justice and other Judges of the Supreme Court and the Chief Justice and other Judges of the High Courts.

(e) Public servants not below the rank of Additional Secretary to the Government of India.

(f) Serving members of the Armed Forces not below the rank of Brigadier in the Army or equivalent rank in the Navy or the Air Force :

(g) manufactures of component parts for utilisation in the manufacture of Maruti vehicles. The number of this category will be restricted to ten per year;

(h) employees of Maruti Udyog Ltd., limited to fifty vehicles per year;

(i) individuals in recognition of their outstanding humanitarian services to the society or to the Nation. The nmber in this category will be restricted to ten per year;

(j) individual cases of undue har ship on humanitarian grounds. T number in this category will be res ricted to five per years.

IV. Error category i.e. individua whose applications for regular allo ment could not be registered on accou of any genuine error.

3. The following conditions wi be strictly observed in the allotmen of vehicles to any organisation/instit tion; person or individual in any of th aforesaid categories :

(a) There will be no resale the vehicle by the allottee for a perio of three years.

This condition will be inserted the order of allotment issued in favou of the allottee. Maruti Udyog Lt will further obtain before giving del very of the vehicle a written undertakin from the allottee that he will not se the vehicle for a period of three year from the date of delivery.

(b) There will be no secon allotment out of the manufacturer quota to the same individual.

(c) In each of the aforesai categories allotment, as for as possibl will be made on first come first serve basis in accordance with the date the receipt of the application for allo ment out of the aforesaid manufacturer quota. In cases where more than on application is received on the same da from individuals in the same category priority of allotment in such cases wil be determined by draw of lots unde proper supervision.

A. P. Sen
Judge
Supreme Court of India

4. It is clarified that allotments made for military/paramilitary purposes and against firm export orders for supply outside of India, will not be included within 5% of the Manufacturers' puota.

5 These guidelines will be in force for a period of three years and will be subject to review taking into consideration the prevoiling circumstances which may exist at that point of time.

6. In view of the aforesaid guidelines, we think, it is unnecessary for us to determine the various submissions and contentions raised on behlf of the parties which are however left open-

7 All general interim orders are vacated. However, deliveries made pursuant to our interim orders will stand.

8. Liberty to apply:

Order accordingly.

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eport No. 33, p. 01

B C. Ray,
Judge
Supreme Court of India

OBSERVATION

Transfer of Government Servant—Transfer is an incident of service—Order of ransfer not resulting in alteration of any condition of service to his disadvantage—rder is not appealable to State Government under R. 19 ILR (1986) kant 2135 ffirmed; (1985) 2 LabLJ 73 (Bom) (Constitution of India, Art 309 (Proviso) arnataka Civil Services (Classification, control and Appeal) Rules (1957), Rr. 19, 18.

OBSERVED BY

A. P. SEN AND B C. RAY,

Hon'ble Judges Supreme Court of India.

IN

Spl. Leave Petn. (Civil) No. 7904 of 1986, decided on 26-8-1986 between 3. Varadha Rao, Petitioner v. State of Karnataka and others, Respondents.

TEXT

ORDER: The short point involved n this special leave petition is whether n order of transfer of a Government ervant made by an authority other han the Government itself, is appeala-le before the Government under R. 9 of the Karnataka Civil Services Classification, Control and Appeal) ules, 1957. There was a divergence f opinion in the High Court on the uestion as to the maintainability of uch appeals. In a series of writ etitions, Rama Jois, J. took the view hat 'transfer' is a condition of service nd therefore the Government servant as a right of appeal against the order f transfer under R. 19 Dodda Kaleg-uda, J., on the other hand, dismissed he writ petition filed by the petitioner olding that no appeal lay to the State Government against an order of trans-er made by the Commissioner of Labour transferring him from Bangalore to Tarikere under R. 19 of the Rules. A number of appeals by the Government as well as the civil servants against the orders passed by the learned Judges were heard together by a Division Bench. The learned Judges have upheld the view of Dodda Kalegouda, J.

2 We have heard B. Varadha Rao, Senior Labour Inspector in the Department of Labour, Government of Karnataka in person. We find no reason to interfere with the view expressed by the Division Bench. As the learned Judges point out, the answer to the question turns on whether an order of 'transfer' varies to the disadvantage of a Government servant, any of his conditions of service attracting the right of appeal under R. 19 (1) (a) of the Rules'. Rule 19 of the Rules

reads as follows:

"19. Appeal against the order—

(1) Every member of any of the Services mentioned in Rule 5 shall be entitled to appeal to Government against the order passed by a subordinate authority which—

(a) denies or varies to his disadvantage his pay, allowances, pension or other conditions of services as regulated by any order, rules or by agreement, or

(b) interprets to his disadvantage the provisions of any such order' rules or agreement where by his pay, allowances, pension or other conditions of services as regulated by any order, rules or by agreement.

3. Part IV enumerates the nature of penalties which can be imposed on a Government servant. R. 17 specifies the order against which no appeal lies. Under R. 18, an appeal is provided from an order passed by an authority imposing any of the penalties specified in R 8. specifies the nature of penalties that may be imposed on the Government servants, such as :

- (i) fine;
- (ii) censure;
- (iii) withholding of increments;
- (iii-a) withholding of promotion;
- (iv) recovery from pay of the whole or part of any pecuniary loss caused;
- (iv-a) reduction to a lower stage in the time-scale of pay for specified period with further directions;
- (v) reduction to a lower time-scale of pay;
- (vi) compulsory retirement;
- (vii) removal from service which shall not be a disqualification for future employment and
- (viii) dismissal from service.

4. The learned Judges observe that these penlties can be imposed on a Government servant where disciplinary proceeding are initiated against him under the Rules by the competent authority. They further observe that R 18 of the Rules therefore provides for appeals against orders imposing penalties referred to and specified in R. 8, and add :

"If an order of transfer does not amount to an order of penalty or any other order" falling within R 19, such an order does not attract and is not appealable either under R 18 or Rule 19".

We agree with the view expressed by the learned Judges that transfer is always understood and construed as an incident of service. The words 'or other conditions of service' in just aposition to the preceding words 'denies or varies to his disadvantage his pey, allowances, pension' in R. 19 (1) (a) must be construed ejusdem generis. Any alteration in the conditions of service must result in prejudice to the Government servant and some disadvantage touching his pay, allowances, pension, port No 33, p. 03

B. C. Ray
Judge
Supreme Court of India

niority, promotion, leave, etc. It is ll understood that transfer of a overnment servant who is appointed a particular cadre of transferable sts from one place to another is ordinary incident of service and erefore does not result in any alter- on of any of the conditions of ser- e to his disadvantage. That a Gover- nent servant is liable to be transfer- l to a similar post in the same cadre a normal feature and incident of overnment service and no Governm- t service and no Government servant n claim to remain a particular place in a particular post unless, of course, s appointment itself is to a specified, n-transferable post. As the learned dges rightly observe :

"The norms enunciated by Gover- nent for the guidance of its officers the matter of regulating transfers are ore in the nature of guidelines to the ficers who order transfers in the ex- encies of administration than vesting any immunity from transfer in the overnment servants."

5. It is no doubt true that the power of transfer is ab- ed, the exercise of the power is tiated. But it is one thing to say that order of transfer which is not made public interest but for collateral pur- ses and with oblique motives is vitia- d by abuse of powers and an alto- ther different thing to say that such order per se made in the exigencies service varies any condition of ser- ce, express or implied, to the disad- ntage of the concerned Government servant. The petitioner who appeared in person placed reliance, as he did in the High Court, on the decison of the Bombay High Court in Sheshrao Nagorao Umap v. State of Maharshtra, (1985) 2 Lab LJ 73. We do not see how the decision can be of any avail to the question at issue. The learned Judges were dealing with a petition under Art. 226 of the Constitution by which a Medical Officer challenged his order of transfer on the ground that it was not only mala fide but was issued in colourable exercise of power and therefore wholly illegal and void. It was contended by the petitioner that he was being transferred contrary to the Government policy with a view to accommodate one Dr R P Patil because of the political influence he wielded. In allowing the writ petition, the learned Judges observed that it was no doubt true that the Government has power to transfer its employees employed in a transferable post but this power has to be exercised bona fide to meet the exigencies of the administration. If the power is exercised mala fide, then obviously the order of transfer is liable to be struck down. They relied on the observations made by this Court in E.P. Royappa v. State of Tamil Nadu, (1974) 2 SCR 348 for the positivistic view that equality is antithetic to arbitrariness and held that the observations equally apply to the policy regarding the transfer of public servants. It was observed :

"It is an accepted principle that in public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in the matter. The Government is the best judge to decide how to distribute and utilise the services of its employees. However this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. Frepuent transfers, without sufficient reasons to justify such transfers, cannot but be held as mala fide. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose than is to accommodate another person for undisclosed reasons. It is the basic principle of rule of law and good administration, that even administrative actons should be just and fair"

The observation that transfer is also an implied condition of service is just an odservation in passing. It certainly cannot be relied upon in support of the contention that an order of transfer ipso facto varies to the disadvantage of a Government servant, any of his conditions of service making the impugned order appealable unde R. 19 (1) (a) of the Rules.

6. One cannot but deprecate tha frequent, unscheduled and unreasonabl transfers can uproot a family, caus irrparable harm to a Government servant and drive him to desperation. I disrupts the education of his childre and leads to numerous other complications and problems and results in hardship and demoralisation. It therefor follows that the policy of transfe should be seasonable and fair an should apply to everbody equally. Bu at the same time, it cannot be forgotte that far as supsorior or more responsible posts are concerned, continue posting at one station or in one department of the Government is not conducive to good administration It create vested interest and therefore we fin that even from the British times th general policy has been to restrict th period of posting for a definite period We wish to add that the position o Class III and Class IV employees stan on a diffierent footing. We trust tha the Government will keep these considerations in view while making a order of transfer.

7. The special leave petition i accordingly dismissed. The petitione is given four months time to join hi new place of posting.

Petition dismissed

Report No. 34, p. 01

E. S. Venkatramiah
Judge
Supreme Court of India

OBSERVATION

Dismissal—During the pendency of the departmental proceedings, servant retired on invalid pension before he had attained the age of retirement—Subsequent order of Govt dismissing him from service after revoking the earlier order would be unsustainable—Bihar Pension Rules, R. 116—Constitution of India, Arts. 309, Proviso and 311 (2).

OBSERVED BY

E. S. Venkataramiah and V. Balakrishna Eradi
Hon'ble Judges Supreme Court of India.

IN

Civil Appeal No. 683 of 1971 decided on 16-7-1986 between Kirti Bhusan Singh, Appeallant v. State of Bihar and others, Respondents.

TEXT

Venkataramiah, J. :— This appeal by certificate is filed against the judgment of the High Court of Patna in Civil Writ Jurisdiction Case No. 444 of 1967 delivered on April 3, 1969 (reported in 1970 Lab. IC 950).

2. The appellant was employed as a Clerk in the Excise Department of the State of Bihar at Hazaribagh. In a disciplinary proceeding instituted against him, 17 charges were framed against him. During the enquiry he has been kept under suspension. The Inquiring Officers however found only six of them established and accordingly a report was submitted by him on November 9, 1960. On the 8th of September, 1961 the appellant was asked by the Excise Commissioner, who was the Disciplinary Authority, to show cause why he should not be removed from service The appellant submitted his reply to the said notice on November 1, 1961 showing cause against the proposed action After the submission of the report by the Inquiring Officer the civil surgeon of the area issued a certificate to the effect that the appellant was an invalid and he could not discharge his duties properly in that state of health. On January 31, 1962 an order was passed by the Excise Commissioner directing the retirement of the appellant on invalid pension under rule 116 of the Bihar Pension Rules with effect from July 19, 1961. Thus he ceased to be a Government employee. Nearly one year and nine months after the date of retirement of the appellant on October 5, 1963 the Government of Bihar revoked the order of retirement and the relevant part of its communication read thus :

"I am to invite a reference to this department memo. No 869 dated

31-1-62 with which the order of the Excise Commissioner was conveyed to you allowing Excise, Clerk, Shri Kirti Bhushan Singh (under suspension) to retire on invalid pension with effect from 19-7-61 under rule 116 of Bihar Pension Rules."

·'The said order has been re-examined by Govt In the light of Rule 73 (f) of the Bihar Service Code, and it has been found that since departmental proceedings were pending against the Excise it was irregular to permit him to retire on invalid pension. Govt. have, therefore, decided to revoke the order of the Excise Commr. contained in his memo No. 869 dated 31-1-62. As a result the Excise Clerk should be deemed to be continuing under suspension and that he would be entitled to subsistence allowances as may be admissible to him under the Rules till final orders are passed on the proceedings which were pending against him at the time the said memo was issued."

3. Thereafter the Excise Commissioner passed an order on November 1, 1963 dismissing the appellant from service. The appellant questioned the order of dismissal in the writ petition before the High Court out of which this appeal arises.

4. In the High Court the appellant contended that after he had been retired from service by the order dated Junuary 31, 1962 with effect from July 19, 1961 it was not permissible to the State Government to revoke the order of retirement by its order dated October 5, 1963 and to the Excise Commissioner to pass an order of dismissal from service thereafter on November 1, 1963. On behalf of the State Government it was contended that it was open to the State Government under rule 73 (F) of the Bihar Service Code to revoke the order of the Excise Commissioner retiring the appellant on invalid pension and therefore the order of dismissal passed subsequently was a valid order. The High Court accepting the contention urged on behalf of the State Government dismissed the writ petition.

5. In this appeal the appellant has questioned the correctness of the judgment of the High Court. In this case the facts are not in dispute. By January 31, 1962 the reply to the show cause notice had already been submitted by the appellant The Excise Commissioner had also before him the medical certificate of the Civil Surgeon. At that stage two courses were open to the Excise Commissioner. He could have either dismissied the appellant if he felt that the charges had been established or he could have ordered his retirement on invalid pension under rule 116 of the Bihar Pension Rules The Excise Commissioner however, passed an order directing the retirement of the appellant on January 31, 1962 with effect from July 19, 1961 Thus the appellant ceased be a Government employee. Any order of dismissal passed there-after would be unsustainable unless it was permissible under law to the State Government to revoke

eport No. 34, p. 03

E.S. Venkataramiah
Judge
Supreme Court of India

ne order of retirement and to reinstate im former status as Government serant before the order of dismissal was assed. Rule 73 (f) of the Bihar Service Code on which reliance is placed by ne State Government reads thus :

> "Notwithstandings anything contaned in foregoing clauses, a Governnent servant under suspension on a harge of misconduct, shall not be equired or permitted to retire on reahing the date of compulsory retirement ut shall be retained in service until he enquiry into the charge is concluded nd a final order is passed thereon by he competent authority."

6. The expression 'compulsory etirement' found in rule 73 (f) of the Bihar Service Code refers to retirement of a Government servant on his attainng the age of superannuation. This is not a case in which the appellant had been permitted to retire from service on the ground that he had attained the ge of superannuation. No order asking he appellant to continue in service before he had attained the age of superannuation for the purpose of concluding a departmental inquiry instituted gainst him had also been passed by he competent authority. On the other hand the appellant had been permitted o retire from service on valid pension on medical grounds even before he had attained the age of superannuation. Rule 73 (f) of the Bihar Service Code is clearly inapplicable to the case of the appellant. No other provision which enabled the State Government or the competent authority to revoke an order of retirement on invalid pension is brought to our notice. The order of retirement on medical grounds having thus become effective and finally it was not open to the competent authority to proceed with the disciplinary proceedings and to pass an order of punishment. We are of the view that in the absence of such a provision which entitled the State Government to revoke an order of retirement on medical grounds which had become effective and final, the order dated October 5, 1963 passed by the State Government revoking the order of retirement should be held as having been passed without the authority of law and is liable to be set aside. It, therefore, follows that the order of dismissal passed thereafter was also a nullity.

7 We, therefore, allow this appeal set aside the judgment of the High Court and quash the order of the State Government dated October 5, 1963 revoking the order of retirement of the appellant and the order of dismissal dated November 1, 1963 passed by the Excise Commissioner.

8. We are informed by the learned counsel for the appellant that the appellant had died on December 28, 1984 during the pendedcy of this appeal. We therefore, direct the State Government to pay to the legal representatives of the appellant all the arrears of pension due to the appellant from November 1, 1963 up to the date of his death. The State Government shall also pay the costs of this appeal to the legal representatives of the appellant.

Appeal allowed

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Report No. 35, p. 01

M. P. Thakkar
Judge
Supreme Court of India

OBSERVATION

Disciplinary enquiry—Dismissal—Non-supply of copies of statements of witnesses and copies of documents relied upon by disciplinary authority—Govt. failed to show that no prejudice occasioned to employee—Order of dismissal held was violative of Art 311 (2) Decision of Allahabad High Court, Reversed—Constitution of India, Art. 311 (2)

OBSERVED BY

R.S Pathak and
M.P. Thakkar
Hon'ble Judges Supreme Court of India

IN

Civil Appeal No. 2571 of 1977 decided on 15-5-1986 between Kashinath Dikshita, Appellant v. Union of India and others, Respondents.

TEXT

Thakkar, J. :— Validity of the impugned order of dismissal is in issue.

1. The scope of the inquiry whether the impugned order of dismissal dated June 11, 1969 is null and void is restricted to two facets. Whether the principles of Natural Justice were violated by the Respondents by refusing to supply to the appellant (1) copies of the statements of the witnesses examined at the stage of preliminary inquiry preceding the commencement of the inquiry and (2) copies of the documents said to have been relied upon by the disciplinary authority in order to establish the charges against the appellant who was holding the post of Superintendent of Police, Bijnor, Uttar Pradesh. Such is the position having regard to the fact that this Court per Bhagwati, J. (as he then was) and Kailasam, J. as per order dated October 25, 1977 whilst granting special leave, has so restricted the scope of the appeal in the following terms :—

> "Special leave granted limited only to the question whether there was any violation of Article 311 of the Constitution in regard to the documents and the statement of witnessees referred to in the affidavit of the petitioner dated 12-2-1977."

3. As many as 8 charges, charges of serious nature, were levelled against the appellant who was at the material time holding the post of Police. The appellant was exonerated of all the charges except and save charsges 1 and 2 and charge 8 partly. The particulars of the charges were set out in the Statement of allegations accompanying the charge-sheet dated April 3, 1962 The

appellant challenged the impugned order of dismissal from service in the High Court on a number of grounds. The High Court repelled all the contentions and dismissed the Writ Petition. It is not necessary to advert to these contentions inasmuch as the controversy has now been narrowed down to one central issue viz. whether there has been violation of principles of natural justice by the reason of :

(i) failure to supply copies of the statements of witnesses recorded exparte at the pre-enquiry stage; and

(ii) the failure to supply copies of the documents on which reliance was placed by the Department to establish the charges before the enquiry commenced.

The following facts are not in dispute :

(i) The appellant had requested for the supply of the copies of all the statements made by the witnesses at a pre-enquiry stage as also for copies of the documents on which reliance was placed in support to the charges levelled against him, as per his letter dated 21-4-1962 Annexuer XI of the writ petition addressed to the Chief Secretary.

(2) The request made by the appellant was in terms turned down by the Disciplinary Authority as per his letter dated 25-7-62. Annexure XIX of the Writ Petition

(3) The Disciplinary Authority granted permission to the appellant to inspect the copies of the statements and documents in question, if he so desired.

(4) The request made by the appellant for being accompanied by his Stenographer to whom he could dictate notes based on his inspection was in terms turned down by the Disciplinary Authority, though the appellant was told that he himself could make such notes as he desired on the basis of the inspection made by him.

(5) The aforesaid copies of the statements of the witnesses and the copies of the documents have not been supplied to the appellant till the conclusion of the departmental proceedings.

(6) In all as many as 38 witnesses were examined in the course of the departmental proceeding and as many as 112 documents were produced to substantiate the 8 charges levelled against the appellant

Preliminary objection :

4 The learned counsel for the respondents have raised a preliminary objection. It has been conteded that no point was made before the High Court that the enquiry was vitiated by reason of the failure to supply the statements made by the witnesses at the pre-inquiry stage and the failure to make available the copies of the documents sought to be used against the appellant in order to establish the charges. It is no doubt true that this point has not been discussed in the judgment rendered by the High Court. Even so the preliminary objection must be overruled for two good reasons. Firstly as will be presently shown the averment made on behalf of the petitioner that the point was in fact

ued before the High Court has not
n specifically controverted And
ondly, after taking into account the
pective affidavits, this Court has
nted special leave permitting the
ellant to raise this point (in fact the
cial leave is restricted only to this
nt).

What transpired at the stage of
cial leave:

(5) Way back in 1977 a notice was
ued by this Court to the respondents
show cause as to why special
ve to appeal should not be
nted to the appellant when the
tter came up before this Court for
nt of special leave. In response to
said notice, the respondents filed
ir counter affidavits. The relevant
tions of the affidevits extracted
e under show that while the appellant
categorically asserted that the point
raised in the Court, the respondents
e not been able to controvert the
d statement in the affidavit in reply
d deny the said allegation:

The appellant had stated in his
davit dated 27-10-75 sworn by the
pellant as under: —

"That the High Court has also
itted to consider the contention
ged on behalf of the petitioner that
ere has been violation of the principles
natural justice inasmuch as the
ard of Inquiry has placed reliance on
rtain documents which had not been
sclosed to the petitioner during the
quiry." In the counter-affidavit dated
ptember' 1976 sworn by Sri Subodh Nath Jha, Deputy Secretary to Government of Uttar Pradesh the respondents have not been able to specifically controvert the averments made in the affidavit, as will be seen from the following passage: —

"That regarding the contents of paragraph 20, the deponent has to say that the Division Bench of the High Court considered every aspect of the matter and observed 'A perusal of the report of the Board of Enquiry revealed that it has taken great pains to discuss the entire prosecution and defence version and given detailed reasons for arriving at the conclusion. The Order of dismissal passed by the Government of India is also a well considered order. We are satisfied that the petitioner was afforded a reasonable opportunity to substantiate his case and got a fair hearing The contention, that there has been a violation of Article 311 of the Constitution, has as such to be rejected."

6 The appellant in his affidavit dated 8-11-1976 sworn by the appellant has stated as under :—

"I was present in the Court at the time of the hearing of the writ petition before the Division Bench of the High Court and my counsel, Shri Shanti Bhushan had argued that there was denial of reasonable opportunity to the petitioner as a result of denial of copies of the documents and statements referred to in the Memo of Charges."

7. In the counter-affidavit dated 29-11-1976 sworn by Shri Ravi Shan-

kar, UDC, Appointment Section-3, U. P. Civil Secretariat, Lucknow the respondents have not been able to specifically controvert the aforesaid averment made in the affidavit, as would be seen from the following passage :—

'That regarding the contents of paragraph 4, the deponent has to submit as under :—

X X X

(e) That in reply to this sub-para it is stated that the Hon'ble High Court has discussed at length the various pleas and arguments placed on behalf of the petitioner and after due consideration, dismissed the Writ Petition filed by the petitioner".

It is thus abundantly clear that the point was raised in the High Court, but the High Court has failed to deal with the question As discussed earlier apart the from position which emerges from the affidavits, the fact remains that this Court has permitted the appellant to raise this point when the special leave was granted. (In fact this is the only point on which leave has been granted). It is therefore futile to contend that the appellant is not entitled to urge this point in support of his appeal. The preliminary objection must therefore fail.

Was there refusal to supply copies?

8. An examination of the record clearly shows that even though the appellant had in terms demanded copies of the documents and statements in question the disciplinary authority had

turned down the request. On De
mber 3, 1963, the appellant had mov
the Board for copies of documer
and statements in question. In the a
plication made by the appellant, he h
made the request in this behalf in t
following terms : —

"1. That he has not so for be
supplied with copies of the documer
cited in evidence and of the statemer
made by persons named as witnesses
the eight charges framed against r
by the first party vide annexures I a
II to G.O

No. CR 70/II-A-1962, dated 3-4-19
from Mukhya Sachiva, Uttar Prades

2. That to prepare himself f
cross-examination of the witnesses f
rebuttal of prosecution evidence ar
for adduction of evidence in my def
nce, the applicant has to make a car
ful and detailed study of the said d
cuments and statements.

3. That it is only after such
careful study of documents and state
ments that the applicant shall be ab
to decide on the names of the witnesse
to be examined in my defence ar
on the nature of documentary evi
dence to be adduced in defenc

4. X X X X X

Prayer. (1) That true copies of a
the documents cited in evidence on th
eight charges against the applicant b
kindly supplied to him as early a
possible

(2) That in the case of each state
ment the place, date and time of th
recording of statement and th

ame, designation and capacity of the fficer recording statement be kindly ndicated.

(3) X X X X"

9. This application was unceremoniously rejected by the Board on December 20, 1963 * It is thus clear hat the appellant's request for supply of copies of relevant documents and statements of witnesses has been refused in on unclear terms. We do not consider it necessary to burden the records by quoting the extracts from the letters addressed by the appellant had the reply sent to him.

The extracts quoted hereinabove leave no room for doubt that the disciplinary authority refused to furnish to the appellant copies of documents and copies of statements. When a Government servant is facing a disciplinary proceedings, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. And no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies how can be concerned employee prepare his defense, cross-examine the witnesses, and point out the inconsistencies with a view to show that the allegations are incredible? It is difficult to comprehend why the disciplinary authority assumed an intransigent posture and refused to furnish the copies notwithstanding the specific request made by the appellant in this behalf. Perhaps the disciplinary authority made it a prestige issue. If only the disciplinary authority had asked itseif the question : "What is the harm in making available the material ?" and weighed the pros and cons, the disciplinary authority could not reasonably have adopted such a rigid and adamant attitude. On the one hand there was the risk of the time and effort invested in the departmental enquiry being wasted if the Courts came to the conclusion that failure to supply these materials would be tantamount to denial of reasonable opportunity to the appellant to defend himself. On the other hand by making available the copies of the document and statements the disciplinary authority was not running any risk. There was nothing confidential or privileged in it. It is not even the case of the respondent that there was invoved any consideration of security of State or privilege. No doubt the disciplinary authority gave an opportunity

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*1. P. 139 of the SLP Paperbook :

"Please refer to your application No. KND/BI-2, dated December 3, 1963 regarding copies of documents and statement cited in evidence.

The Board of Inquiry regrets that it is not possible for them to accede to your request since you have already been allowed by Government an access to the relevant official records for the purpose of preparing your written statement as provided under sub-rule (4) of rule 5 of the All India Services (Discipline and Appeal) Rules, 1955."

to the appellant to inspect the documents and take notes as mentioned earlier. But even in this connection the reasonable request of the appellant to have the relevant portions of the documents extracted with the help of his stenographer was refused He was told to himself make such notes as he could. This is evident from the following passage extracted from communication dated 25-7-1962 from the disciplinary authority to the appellant :—

"The Government has been pleased to allow you to inspect all the documents mentioned in Annexure II to the charge sheet given to you. While inspecting the documents, you are also allowed to take notes or even prepare copies, if you so like, but you will not be permitted to take a stenographer or any other person to assist you. In case you want copies of any specific documents, from out of those inpected by you, the request will be considered on merits in each case by the Government. In case you want to inspect any document, other than those mentioned in Annexure II, you may make a request accordingly briefly indicating its relevancy to the charge against you, so that orders of the Government could be obtained for the same, X X X X As pointed out above, if you wish to have copies of any specific documents, from those inspected by you, you should make a request in writing accordingly, mentioning their relevancy to the charge, so that orders of Government could be obtained. Government, however, maintains that you are not entitled to ask for copie of documents as a condition preceden to you inspection of the same. I am further to add that in case you do no inspect the documents on the date fixed you will do so at your own risk."

10. And such a instance was adopted in relation to an inquiry whereat a many as 38 witnesses were examined, and 112 documents running into hundreds of pages were produced t substantiate the charges. In the fact and circumstances of the case we fin it impossible to hold that the appellan was afforded reasonable opportunit to meet the charges levelled agains him. Whether or not refusal to suppl copies of documents or statements ha resulted in prejudice to the employe facing the departmental inquiry depend on the facts of each case. We are no prepared to accede to the submissio urged on behalf of the respondents tha there was no prejudice caused to th appellant in the facts and circumstance of this case. The appellant in hi affidavit page 309 of the SLP Pape book has set out in a tabular form running into twelve pages as to ho he has been prejudiced in regard to hi defence on account of the non-suppl of the copies of the documents. We d not consider it necessary to burde the record by reproducing the sai statement. The respondents have no been able to satisfy us that no prejudic was occasioned to the appellant.

11. Be that as it may, eve without going into minute detail it i

ident that the appellant was entitled have an access to the documents and atements throughout the course of e inquiry. He would have needed ese documents and statements in order cross-examine the 38 witnesses who ere produced at the inquiry to tablish the charges against him So so at the time of arguments, he would ave needed the copies of the docum- nts. So also he would have needed e copies of the documents to enable im to effectively cross examine e witnesses with reference to the ontents of the documents. It is bvious that he could not have done o if copies had not been made available o him. Taking an overall view of the atter we have no doubt in our mind at the appellant has been denied a easonable opportunity of exonerating imself. We do not consider it necess- ry to quote extensively from the uthorities cited on behalf of the parties, eyond making passing reference o some of the citations, for, whether r not there has been a denial to fford a reasonable opportunity in the ackdrop of this case must substantially epend upon the facts pertaining to this atter.

12. The appellant relied n Tirlok Nath v. Union of India 967 Serv LR 759 (SC) in support f the proposition that if a public ervant facing an inquiry is not supplied opies of documents, it would amount to denial of reasonable opportunity. It has been held in this case:

"Had he decided to do so, the documents would have been useful to the appellant for cross-examining the witenesses who deposed against him. Again had the copies of documents been furnished to the appellant he might, after perusing them, well have exercised his right under the rule and asked for an oral inquiry to be held. Therefore in our view the failure of the Inquiry Officer to furnish to the appellant with copies of the documents such as the FIR and statements recorded at Shidhipura house and during the investigation must held to have caused prejudice to the appellant in making his defence at the inquiry."

Reliance has also been placed on State of Punjab v. Bhagat Ram (1975) 2SCR 370 and State of Uttar Pradesh v. Mohd. Sharif (dead) through LRs. (1982) 2 Lab LJ 180 in support of the proposition that copies of statement of witnesses must be supplied to the Government servant facing a departmental inquiry. It has been emphatically stated in State of Punjab v. Bhagat Ram by this Court as under:—

"The State contended that the respondent was not entitled to get copies of statements. The reasoning of the State was that the respondent was given an opportunity to cross-examine the witnesses and during the cross-examination the respondent would have the opportunity of confronting the witnesses with the statements. It is contended that the synopsis was adequate to acquaint the respondent with the gist of the evidence.

The meaning of a reasonable oppotunity of showing cause against the action proposed to be taken is that the Government servant is afforded a reasonable opportunity to defend himself against the charges on which inquiry is held. The Government servant. should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining. The witnesses produced against him The object of supplying statements is that the Government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the Government servant. Unless the statements are given to the Government servant he will not be able to have an effective and useful cross-examinaion.

It is unjust and unfair to deny the Government servant copies of statements of witnesses examined during investigation and produced at tne inquiry in support of the charges levelled against the Government servant A synopsis does not satisfy the requirements of giving the Government servant a reasonable opportunity of showing cause aginst the action proposed to be taken."

13. In view of the pronouncements of this Court it is impossible to take any other view. As discusse earlier the facts and circumstances o this case also impel us to the conclusion that the appellant has been denie reasonable opportunity to defend himself In the result, we are of th opinion that the impugned order o dismissal rendered by the disciplinar authority is violative of Articlc 31 1 (2 of the Constitution of India inasmuc as the appellant has been denied reasonable opportunity of defending himself and is on that account null an void. We accordingly allow the appeal. The judgment of the High cour is set aside The impugned order o dismissal dated 10-11-1967 passe against the appellant is quashed an set aside. We further declare that th impugned order of dismissal is a nut lity and non-existent in the eye o law and the appellant must b treated as having continued in servic till the date of his superannuation o January 31, 1983. Taking into account the facts and circumstances o this case and the time which has elapsed we are of the opinion that the State Government should not be permitted to hold a fresh inquiry agains the appellant on the charges in question. We therefore direct the Stat Government not to do so.

14. The appeal is allowed accordingly with costs throughout.

Appeal allowed

eport No. 36, p. 01

R.N. Misra
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Arts. 14, 32—Superannuation—Age of officers of Bharat etroleum fixed at 58 years while that of clerks at 60 years—Not discriminatory urisdictions under Art. 32 and S. 10, I.D Act compared. (Industrial Disputes ct (14 of 1947), S. 10).

OBSERVED BY

R. S. Pathak and R. N. Misra,

Hon'ble Chief Justice and Judges Supreme Court of India

IN

Writ Petn. (Civil) Nos. 1566-67 and 1548-71 of 1984 and 2740-45 of 1985, ecided on 11-9-1986 between Tejinder Singh and another, Petitioners v. M/s harat Petroleum Corporation Limited and another, Respondents.

and

O. P. Gupta and others, Petitioners v. M/s. Bharat Petroleum Corporation Ltd. d another, Respondent.

And

K. P. Gokhale and others, Petitioners v m/s. Bharat Petroleum Corporation td., Respondent.

TEXT

Ranganath Misra, J. :— All these pplications under Article 32 of the onstitution are by officer called the Ianagement Staff employed under the espondent No. 1 and challenge in all e Writ petitions is to the age of superannuation at 58 Years. The principal round of attack is discrimination etween the clerical staff for whom the ge of retirement is 60 years had the anagement staff in whose case such erminal point is 58 years. It is also the laim of the petitioners that in keeping ith the current trend in the commeral field such age should be fixed t 60.

2. Each of the petitioners in Writ Petitions Nos. 15466 and 16467 of 1984 and 2745 of 1985 is a recent recruit for the management staff while each of the petitioners in the remaining cases was an employee under the Burmah Shell Oil Storage and Distributing Company of India Limited and after the take over of that Company under the Burmah Shell (Acquisition of Undertakings in India.) Act, 1976, has become an officer of respondent No. 1

3. In Som Prakash Rekhi v. Union of India, (1981) 2 SCR 111 : (AIR 1981 SC 212), this Court has held respondent No. 1 to be "State" within

the meaning of Article 12 of the Constitution. There has, therefore, been on dispute before us that the petitioners would be entitled to invoke the protection of of Article 14 in case there indeed be any discrimination.

4. This Court in Workmen of the Bharat Petroleum Corpn. Ltd. (Refining Division) Bombay v. Bharat Petroleum Corpn Ltd, (1984) 1 SCR 251 : (AIR 1984 SC 356), directed the retirement age of the clerical staff of the Refinery Division of respondent No. 1 to be fixed at 60 years. Petitioners have contended that the disparity in the age of retirement between two groups of employees gives rise to discriminatory treatment. This stand is not tenable for more than one reason. Clerical staff and officers of the management staff belong to separate classifications and no argument is necessary in support of it, petitioners have not contended and perhaps could not legitimately contend, that two classes of officers stand at per. In the Workmen's case itself, this Court did not extend the benefit of superannuation at the age of 60 to all clerical staff but limited the same to that category of employees working in the Refinery Division, Bombay, Classification on the basis of reasonable differentia is a well-known basis and we are of the view that the petitions are not entitled in the facts of the case to seek support from Article 14 for their claim.

5. The claim of the clerical staff arose in an industrial dispute. The scope of such an adjudication is wide and broard based. The Tribunal has expansive jurisdiction to exercise when a reference is mad to it This Court in appeal against th Award was exercising the same jurisdiction in that case. We do not think, i would be appropriate for this Court t exercise that jurisdiction in dealing wit an application under Article 32 of th Constitution It must also be remembered that officers of the managemen staff are not workmen

6 It is true that this Court i workmen of the Bharat Petroleum Corporation Ltd. (Refinining Division Bombay (AIR 1984 SC 356) quoted wit approval its earlier observations i British Paints (India) Ltd v. Its workmen (1966) 2 SCR 523 : (AIR 1966 SC 732) where it was said :

"But time in our opinion has no come considerting the improvenment in the standard of health and increase in longevity in this country durin the last fifty years that the age of retirement should be fixed at a higher level and we consider that generally speakin in the present circumstances fixing th age of retirement at 60 years would b fair and proper, unlest there ar special circumstances justifying fixatio of a lower age of retirement."

Again in G. M Talang v. Sha Wallace and Co. (1964) 7 SCR 424 (AIR 1964 SC 1886), this Court referre to the Report of the Norms Committe where it was said :

"After taking into consideratio the views of the earlier Committees an

eport No. 36, p. 03

R. N. Misra
Judge
Supreme Court of India

ommissions including those of the econd Pay Commission the report of hich has been released recently, we eel that the retirement age for workmen all industries should be fixed at 60,'.

A distincton in the treatment on e point in issue between workmen nd officers is cleary discernible in judiial thinking as also expert opinion. esides, the petitioners have not brouht before the Court all the material elevant to the making of a claim as ade from which support could be ad. On the other hand, the respondnt No. 1 in its affidavit in opposition as placed various aspects to justify ixation and continuation of the present age of retirement. In may be that some day, in keeping with the trend of the times, a claim of the type as laid in these applications may have to be examined. We, however, hope that adjudication will be required to be made on more cogent and appropriate material than now. If this Court is moved, it has then to be considered whether an application under Article 32 is the proper remedy for it. We are, however, of the view that the petitioners are not entitled to their claim in these applications. The Writ Petitions are dismissed but without costs.

Petitions dismissed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

B. C. Ray
Judge
Supreme Court of India

OBSERVATION

Compulsory Retirement—Senior Superintendent of Police is competent autho- to make appointment to non-gazetted ranks of Sub-Inspectors etc.—The (S.S.P.) gally competent to pass order of compulsory retirement of a Sub-Inspector in lic interest after his attaining 50 years of age under R. 3 (1) (a). Decision of jab High Court, Reversed—Constitution of India, Arts. 309, Proviso, 110, 111— jab Civil Services (Premature Retirement) Rules (1975), Rr. 3 (1) (a), 2 (i), 12 1, (2).

OBSERVED BY

R. S. Pathak, V. Khalid and B. C. Rai,
Hon'ble Chief Justice and Judges, Supreme Court of India.

IN

Civil Appeal No. 2416 of 1981, decided on 10-12-1986 between State of Punjab others, Appellants v Manohar Lal, Respondent.

TEXT

B. C Ray, J. :– This appeal by cial leave is against the judgment decree passed in Regular S. A. 2868 of 1980 by the High Court Punjab & Haryana whereby the app- was dismissed.

2. The respondent, Manohar Lal o was at the relevant time working sub-Inspector in the Police Line, rdaspur was compulsorily retired Order No. 9754-B dated 24-9-1975 ied by Shri M. M. Batra, Senior perintendent of Police, Gurdaspur, public interest. The said order of npulsory retirement has been challe- d by the respondent by filing a t being case no. 86 of 1977 praying a declaration that the aforesaid or- of compulsory retirement is illegal, la fide, unconstitutional, against the rules of natural justice and the plaintiff-respondent shall be deemed to be in service of the Punjab State to the post of Sub-Inspector till his retirement at the age of 58 years i e. on 13-2-1981. There is also a prayer for a direction to the defendant appellant for payment of the balance of the salary for the period from 5-9-1974 to 23-9-1975 i. e. the suspension period after deducting therefrom the subsistence allowance paid by the defendant and also the increment that has accrued to him under the rules from time to time during that period. This amount was stated to be Rs. 3,446/- for the said period. The said suit was heard by the Subordinate Judge, Gurdaspur who by his order dated 27th Jan. 1979 held that the impugned order was

not passed at the instance of Sardar Harjit Singh Ahluwalia, Deputy Inspector General of Police nor the same was vitiated by malice or any malafides. It was further held that the order was made innocuously by the Senior Superintendent of Police in public interest in accordance with the provision of Punjab Civil Services (Premature Retirement) Rules, 1975. The Subordinate Judge also held that so far as the pay for the period of suspension is concerned the plaintiff was entitled to have recovery of Rs. 3, 446/- as arrears of pay during the suspension period. The suit was accordingly decreed in part. Against the said judgment and decree two appeals were filed, one by the plaintiff-respondent Manohar Lal being C. A. No. 169/308 of 1979 and another by the State of Punjab registered as C. A. No. 170 of 1979 and 12 of 1980. Both these appeals were heard together and were disposed of by a common judgment by the Additional Sessions Judge, Gurdaspur. Decreeing the Civil Appeal No. 169/308 of 1979 it was held that the order of compulsory retirement was made by an officer namely Senior Superintendent of Police, Gurdaspur who was below the rank of Inspector General of Police who is the appointing authority of the petitioner. It was also held that the judgment and decree as regards the payment of the balance of emoluments during the period of suspension after the reinstatement of the petitioner, was legal and valid and the said decree was affirmed and the appeal was allowed decreeing the suit. In th
view of the matter the appeal filed b
the State was dismissed. Against th
said judgment and decree the State
Punjab preferred the instant appea
being R.S A. No. 2868 of 1980 befor
the High Court of Punjab and Haryana
The High Court dismissed the sa
appeal and affirmed the judgment an
decree of the lower appellate Cour
Against this judgment and decree th
present appeal was filed before th
Court with an application leave und
Art. 136 of the Constitution.

3. The only question that arises f
consideration in this appeal is wheth
the order of compulsory retireme
made by the Senior Superintendent
Police, Gurdaspur is illegal and invali
being passed by an authority low
in rank than the appointing authorit
which according to the responde
is the Deputy Inspector General
Police. It appears that the Governme
of Punjab framed rules under provis
to Art. 309 of the Constitution an
these rules are termed as the Punja
Civil Services (Premature Retiremen
Rules, 1975. In Rule 2 (i) the 'Appoin
ting Authority' has been defined a
meaning the authority which has powe
to make substantive appointments t
the post or service from which th
Government employee is required o
wants to retire or any other authorit
to which it is subordinate.

4. Rule 3 reads as follows :—

"3 (1) (a) The appropriate author
ity shall, if it is of the opinion that i

s in public interest to do so, have the bsolute right, by giving an employee rior notice in writing to retire that mployee on the date on which he completes twenty-five years of qualifying ervice or attains fifty years of age or n any date thereafter to be specified n the notice.

(b) The period of such notice hall not be less than three months :

provided that where at least three nonths' notice is not given or notice or a period less than three months is iven, the employee shall be entitled o claim a sum equivalent to amount of is pay and allowances, at the same ates at which he was drawing them mmediately before the date of retirement for a period of three months or, s the case may be, for the period by vhich such notice falls short of three nonths.”

5. The relevant excerpt of Rule 2 1 is quoted herein below :—

“The following table summarises he directions given by the Provincial Government under Clause (b) of Sub-ection (1) of Section 241 of the Government of India Act., 1935, in regard o the authorities competent to make ppointments to the non-gazetted rank

1	2	3
Class of Government ervants	Deputy Inspector General of Police Assistant Inspector-General, Govt Railway Police, Assistant Inspector General, Provincial Additional Police (designated as Commandant, Provincial Additional Poliee) and the Assistant Inspector-General Police (Traffic)	Full powers subject to rules governing the conditions of service as defined in Police Rules
Sergeants, Sub-Inspectors and Assistant Sub-Inspectors	Superintendents of Police Commandants of P. A. C. Vide C. S No. 155 dated 2nd June, 1964 and Deputy Superintendents (Administrative), Government Railway Police and Assistant Superintendent, Government Railway Police.	

Rule 13.3(2) also provides that substantive promotions to the rank of sub-Inspector and Assistant Sub-Inspector shall be made by the Superintendent of Police and the Assistant Superintendent, Government Railway Force.

6. On considering the provisions of the aforesaid rules it is quite clear and apparent that the Senior Superintendent of Police, Gurdaspur being the competent authority to make the appointment to the non-gazetted ranks of Sub-Inspectors, is also legally competent to pass the order of compulsory retirement of the plaintiff-respondent in public interest in accordance with the

provisions of Rule 3 (1) (a) and (b) of the said rules. It has been tried to be contended by referring to the provisions of Rule 13.9, Sub-rule (2) by the respondent wherein it has been provided that substantive promotion to the rank of Assistant Sub-Inspector is to be made by the Deputy Inspector General of Police in accordance with the principles prescribed in Rule 13.1 that the Superintendent of Police is not the competent authority to make the impugned order. It is only the Deputy Inspector General of Police who is competent to make the order of compulsory retirement in question. This argument cannot be sustained in view of the specific provisions made in Rule 12.1 wherein it has been provided that the Superintendent of Police is competent to make the appointment to the non-gazetted ranks of Sub-Inspectors of Police and Assistant Sub-Inspector of Police. On a reading of both these provisions of the Rules 12.1 and 13.9 (2) it is clear and apparent that the Senior Superintendent of Police, Gurdaspur is legally competent to make the impugned order of compulsory retirement of the plaintiff respondent from service in public interest after his attaining 50 years of age in accordance with the provisions of Rules 3 (1) (a) of the Punjab Civil Services (Premature Retirement) Rules, 1975.

7. In view of the reasons stated hereinbefore we do not find any merit in the contention made on behalf of the respondent and therefore we allow the appeal and set aside the judgment and order of the High Court in part in so for as it affirms the judgment and decree of the lower appellate Court, setting aside the order of compulsory retirement. The judgment end decree of the trial Court is hereby affirmed and the decree of the lower appellate Court as regards the payment of Rs. 3,446/- being the balance of pay after deducting the subsistence allowance during the period of suspension of the respondent from 5-9-1914 and 23-9-1975 is hereby affirmed. There will however, be no order as to costs.

Appeal allowed.

E. S. Venkatramiah
Judge
Supreme Court of India

OBSERVATION

(A) Service matter—Writ petition before Supreme Court alleging denial of promotional opportunities due to irregular implementation of relevant rules—Question left open to be decided by Administrative Tribunal in view of inadequacy of material and non impleading persons likelv to be affected. (Administrative Tribunal Act (13 of 1985), S.28)—Constitution of India, Arts. 32, 311.

(B) Direct recruits and promotees—Discrimination between—Promotee officers of Telecommunication Research Centre granted Special Pay—Denial to direct recruits though doing same job and possessing equal qualifications—Held, discriminatory (Scientific & Technical Officers Grade I (Telecommunications Research Centre of the Posts & Telegraph Departmedt) Recruitment Rules (1962), R 17) Constitutian of India, Arts. 16, 14

OBSERVED BY

E.S. Venkataramiah and K. N. Singh,
Hon'ble Chief Justice and Judges Supreme Court of India.

IN

Writ Petitions Nos. 3269-3290 of 1982 decided on 16-1-1987 between Telecommunication Research Centre Scientific Officers (Class I) Association and others, Petitioners v. Union of India and others, Respondents.

TEXT

Venkataramiah, J.:—The first petitioner in these petitions is the Telecommunication Research Centre Scientific Officers (Class I) Association. The petitioners 2 to 22 are its members. They are working as officers in the Telecommunication Research Centre of the Posts and Telegraph Department which is directly under the control of the P. &.T. Board of the Ministry of Communications, Government of India. The Telecommunication Research Centre is engaged in the research and development work concerning the telecommunication equipment for the use of the Department and in advising the P. & T. Board on relevant technical matters relating to the introduction of new equipment and technology in the existing public communication network. The recruitment to the differnt cadres in the Telecommunication Research Centre is now being made under the Scientific and Technical officers Grade I (Telecommunications Research Center of the Posts and Telegraphs Department) Recruitment Rules, 1962 (hereinafter referred to as "the Recruitment Rules") framed by the President under the proviso to Article 309 of the Constitution of India. During the period between 1956 & 1962 and further till 1965 all the Class 1 posts of the Scientific and Technical officers Grade 1 namely Assistant Director and Deputy Director were manned by the Transferred Field Officers belonging to the Indian Telecommunication Service Group A & Group B. For the first time the Union Public Service Commission advertised for the recruitment of 10 Scientific and Technical Officers Grade I in the Telecommunications Research Centre under the Recruitment Rules. These were General Central Service Class I posts and they continue to be so till today. In response to the said advertisement petitioners 2, 3 and 4 applied for recruitment and they were selected for appointment to the posts of S & T. Os. Grade I. At the time of the filing of these writ petitions there were in all 21 officers who had been recruited at the entry level of Junior Class I posts of S. &. T. Grade I. They were recruited in four batches in 1965, 1967, 1970 and 1973.

2. The Class I posts in the Telecommunication Research Centre consist of the following posts:

1. Director Senior Administrative Grade Level I)
2. Additional Director (Senior Administrative Grade Level II)
3. Deputy Directors (Junior Administrative Grade)
4. Assistant Directors (Senior Class I)
5. Scientific and Technical Officers Grade I (Junior Class I).

3. The posts of Deputy Directors, Assistant Directors and S.T. Os. Grade I are filled by the following methods:

(a) by direct recruitment through the Union Public Service Commisson, (The petitioners belong to this category. They are now holding the posts of Assistant Directors or Deputy Directors since 1975. Direct recruitment to the, Telecommunication Research Centre has been discotinued).

(b) by transfer of Group A Field Officers recruited through the Union Public Service Commission by written examination followed by an interview, (These officers belong to the Indian Telecommunication Service Group A) and

(c) by transfer of Group B Field Officers who are Posts and Telegraphs departmental promotees belonging to the Telegraph Engineering Service, Group B.

4. The direct recruits to which category the petitioners belong and the Transferred Field Officers Group A working in the Telecommunication Research Centre discharge same functions and duties. The qualifications for recruitment prescribed in the case of both classes are the same They are in the same pay scales from 1-1-1973 at the comparable levels/grades,, i e., Scientific and Technical Officers Grade I, Assistant Directors and Deputy Directors as recommended by the Third Pay Commission and accepted by the

overnment.

5. In these petitions, the petitiers have raised two grounds, namely, e first relating to the denial of promoonal opportunities to them on account the irregular implementation of the les of promotion contained in the ecruitment Rules and the second ating to violation of Article 14 and ticle 16 of the Constitution by not anting them the same special pay ich is granted to the transferred icers who are working in the Telemmunication Research Centre in the me posts and discharging the same nctions as the petitioners.

6. Having regard to the inadeacy of the material produced by th the sides before us and to the fact at the officers who are likely to be fected by the decision are not impleacd as parties by name to these petitins, we are of the view that first queson should be left open to be decided the Central Administrative Tribunal. e accordingly express no opinion on e said question.

7. The second question relating to e grant of Special Pay requires to be ecided by us. It is seen that the Indian eleeommunication Service Officers ho are working in the Telecommunition Research Centre are being given pecial Pay of Rs. 300/-Rs.200/-and s 150/-per month in addition to their y scales in the grades of Deputy irector, Assistant Director and Scienfic and Technical Officers Grade I spectively with effect from 1-1-1973. he direct recruits to which categoıy the petitioners belong are not given any Special Pay in these grades and they are given only the pay at the pay scales prescribed for them. It is stated that the total number of officers who are thus getting Special Pay is of the order of 275 while only about 25 officers who are direct recruits working in the Telecommunication Research Centre are not given Special Pay paid to the others holding the same posts. A number of representaions had been made earlier by the direct recruits but all in vain. It appears that at the official meeting held in May, 1979 with Shri J. A. Dave Secretary, Communications, Government of India, there was consensus on the question of granting of Special Pay to the direct recruits as in the case of transferred officers as can be seen from the letter written by the Association of the petitioners (Annexure XIX) and that the Director, Telecommunication Research Centre also recommended for granting Special Pay accordingly. But nothing came out of all this. Hence the petitioners have filed these petitions demanding payment of Special pay to them also.

8. The discrimination between the direct recruits and the transferred officers regarding the payment of Special Pay is attempted to be justified by the Government in the counter affidavit filed by Shri C.L.Sumon, Assistant Director General (P & T Directorate). It is stated that the petitioners (direct recruits) who are specifically recruited to the Telecommunication Research

Centre for a limited purpose are not entitled to any Special Pay but the transferred officers, from the Indian Telecommunications Service who are selected by the Union Public Service Commission after a rigorous competive examination need to be paid Special Pay. It is alleged that ‘it is felt that most of the direct recruits TRC officers may be good in small areas in which they are working but their capability of taking over a complete group and directing them to fruitful research is doubtful’. This statement is a vague one and has the effect of adding insult to injury. This allegation appears to be a lame excuse for denying what is legitimately due to the direct recruits It is not the case of the Government that the petititioners are not competent and are not able to discharge their duties. All the direct recruits are graduate engineers and have been working throughout in the Telecommunicarion Research Centre They do the same job as the transferred officials. The Special Pay is not being paid to the transferred officials for compensating their displacement or for their qualifications. It is not deputation allowance. It is paid for the arduous and special nature of the functions to be discharged in the Telecommunication Research Centre. The rigorous test is applied while transferring them to the Telecommunication Research Centre to prevent persons of inferior calibre amongst them getting into the said centre. It does not mean that persons who are directly recruited and working in the centre are inferior to those who ent the centre by transfer. It is interesti to note that the Minister of State f Communications answered the questio relating to non-payment of Special Pa in the Lok Sabha on March 30, 19 thus ;

“Question No 5864–Will the Mini ter of Communications be pleased state :

(c) whether it is a fact that Spec al Pay is not given to a few gradua engineers recruited specifically for TR when the qualifications, duties an responsibilities of these officers in TR are the same as those of the field office transferred to TRC and what is th reason for not doing so?’.

Answer Minister of State f communications :

2. The officers specifically recruite for TRC through UPSC, are performin functions for which they are recruite while on the other hand, the office drawn from the ITS cadre, when poste in TRC, are required to perform dutie which are not in their general line.”

9. It is seen from the above answe that the Government had virtuall admitted that all relevant things suc as qualifications, functions, duties an responsibilities are the same as betwee direct recruits and the transferred offici als and that the transferred officials ha to be paid extra amount by way of Spe cial pay in addition to their scale of pa which is the same as the scale of pay o direct recruits because the transferre officials had to perform in the Telecom-

ication Research Centre duties which not in their general line. In another of the same answer it was also itted that many such transferred ials were in the Telecommunication earch Centre for more than six s. Still the Government did not v any eagerness to grant special pay he direct recruits also. We feel that e is no justification to deny the cial Pay at the same rates to the ct recruits working in the Telecom-ication Research Centre. Denial pecial Pay in the above circumst-es to the direct recruits amounts to ation of Articles 14 and 16 of the stitution of India.

10. Following the decision of this rt in Randhir Singh v. Union of ia, (1982) 3 SCR 298 : (AIR 1982 SC) and the decision of this Court in . Singh v. Union of India (Writ ns Nos 13097—13176 of 1987 deci- today) (reported in AIR 1987 SC) we hold that the direct recruits (to ch category the petitioners belong) in the Telecommunication Research Centre are entitled to the Special Pay at the same rates at which it is paid to the transferred officers working in that centre with effect from the date from which the transferred officers have been drawing the Special Pay. We accordingly direct the Respondent No. 1-Union of India to pay the special pay to the direct recruits with effect from the date on which the transferred officers commenced to draw the Special Pay up to date and to continue to pay it in future also as long as the transferred officers continue to get it. The arrears of the Special Pay up to date payable to the direct recruits shall be paid within four months from today.

11 The above petions are allowed to the above extent. The question relating to the denial of promotional opportunities to the petitioners according to the Recrruitment Rules is left open to be agitated before the Central Administrative Tribunal. No costs.

Petitions partly allowed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

A. P. Sen
Judge
Supreme Court of India

OBSERVATION

(A) Uuauthorised occupation of Government quarter by employee—Recovery of damages equivalent to market rent—Prior notice te employee not necessary—Held relaxation by Government or estoppel against it could not be inferred in instant case (Evidence Act (1 of 1872), S. 115) : (Fundamental Rules, R. 45). Allotment of Government Residences (General Pool in Delhi Rules (1063), SR 317-B-11 and 22.

(B) Pensions Act (23 of 1871), S. 11—Words "money due or to become due on account of pension"—Include commuted portion of pension payable to retired employee—Rent due from such employee for accupying Government quarter—Cannot be deducted from the amount of commuted pension.

OBSERVED BY

A.P. Sen and Natarajan,

Hon'ble Chief Justice and Judges Supreme Court of India.

IN

Civil Appeal No. 4426 of 1986 (In SLP. No. (16044 of 1985), decided on 30-1-1987 between Union of India and another, Appellant v. Wing Commander, R.R. Hingorani (Retd.) Respondent.

TEXT

Sen J. :- This appeal by special leave directed against the judgment and order of the delhi High Court dated September 11, 1985 raises question of frequent occurrence. The question is whether where a Government servant retains accommodation allotted to him under SR 317-B-11 beyond the concessional period of two months permissible under sub-r, (2) thereof, the liability to pay damages equivalent to the market rent for the such period of unauthorised occupation under SR 317-B-22 is contingent upon the Directorate of Estates serving a notice upon him that he would be liable to pay market rent for retention of such accommodation as held by the High Court.

2. Put very briefly, the essential facts are these. In the year 1968 the respondent who was then a Squadron Leader in the Indian Air Force on being posted at the Headquarters, Western Command, Palam, Cantonment, Delhi, applied on May 9, 1968 for allotment of accommodation in the Curzon Road Hostel, New Delhi. In the application for allotment he gave a declaration that he had read the Allotment of Government Residences (General Pool in Delhi) Rules, 1963 and the allotment made to him shall be subject to the said Rules, including the amendments made there to. The Directorate of Estates by its

order dated June 27, 1968 allotted Flat No. 806 B to the respondent in the Curzon Road Hostel on a rent of Rs. 161/- per months, exclusive of electricity and water charges. The respondent was transferred from Delhi to Chandigarh on June 11, 1970 and therefore the allotment of the fllat to him stood automatically cancelled under sub-r (3) of SR 317-B-11 after the concessional period of two months from the date of his transfer i e w.e.f. August 11, 1970. He however did not give any intimation of his transfer to the Directorate of Estates with the result that he continued in anauthorised occupation of the said flat for a period of nearly five years and was being charged the normal rent for that period On February 28, 1975 the Estate Officer having come to know about the transfer of the respondent from Delhi, the Directorate addressed a letter dated March 18, 1975 cancelling the allotment w.e.f August 11, 1970 and intimating that he was in unauthorised occupation thereof. On the next day i. e. the 19th, the Directorate sent another letter asking the respondent to vacate the flat. On March 25, 1875 the respondent vacated the flat and handed over possession of the same to the Directorate of Estates. But he addressed a letter of even date by which he repudiated his liability to pay damages alleging that he was in possession of the flat under a valid contract and that at no time was he in unauthorised occupation and further that under the said contract he was not liable to pay damages.

3. It appears that there was some correspondence between the parties but the respondent disputed his liability to pay damages for the period of his unauthorised occupation. In consequence thereof, proceedings were initiated by the Estate Officer under S. 7 of the Public Premises (Eviction of Unauthorised occupants) Act. 1971 to recover Rs. 38, 811.17 p. as damages. The Estate Officer duly served notices on the respondent under S. 7(3) of the Act from time to time and the respondent appeared in the proceedings and contested the claim. Apparently, the responent in the meanwhile made a representation to the Central Government. On such representation being made, the Government on compassionate grounds reduced the amount to Rs. 20, 482.—78 p. and deducted the same on October 30, 1976 from out of the commuted pension payable to the respondent. On November 25, 1976 the respondent appeared and protested against the recovery of the amount of Rs. 20, 428.-78 p. from the commuted pension payable to him which, according to him was contrary to S. 11 of the Pensions Act, 1871, by process of seizure and sequestration. The respondent complaints that despite his repeated requests, he was not given opportunity of a hearing and was informed that the matter being examined in depth, and that the whole procedure was arbitrary and capricious.

4. The respondent filed a petition in the High Court under Art. 226 of the Constitution challenging the action

the Government in making a unilatal deduction of Rs. 20, 482 78 p. wards recovery of damages from the mmuted pension payable to him, hich, according to him, was contrary S 11 of the Pensions Act, 1871. ne writ petition was allowed by a lear ed single judge by his judgment and rder dated September 7, 1981 ho held that although the allotment of e flat to the respondent stood cancel d in terms of sub-r. (3) of SR 317B w e. f. August 11, 1970 i. e. after e concessional period of two months om the date of his transfer, the overnment was estopped from claiming e amount of Rs 20, 484. 78 p. damages equivalent to the market nt under SR. 417-B-22 for the period om August 11, 1970 to March 25, 1975. coming to that conclusion, the arned single Judge held that the overnment not only knowingly allved the respondent to continue in ccupation till March 25, 1975 nd charged him the normal rent of Rs. 61/-per month presumable under its ower of relaxation under SR 317-B 25. urther, he held that the Government aving failed to serve the respondent ith a notice that he would be liable to ay market rent for the period of such nauthorised occupation, the doctrine f promissory estoppel precluded the overnment from claiming damages quivalent to the market rent under SR 17-B-22 for the appellant preferred an ppeal but a Division Bench by its judgnent under appeal affirmed the decision of the learned single Judge. It based its decision mainly on the the terms of SR 317-B-25 which confer the power of relaxation on the Government and held that since the Government had not recovered the rent at the market rate as permissible under SR 317-B – 22 w. e. f. August 11, 1970 and having knowingly allowed the respondent to retain the flat for the period in question, it must be presumed that Government had acted in exercise of its power of relaxation under SR 317-B-25.

5. In support of the appeal Shri G Ramasway, learned Additional Solicitor General mainly advanced two contentions. First of these is that where a Government servant has retained the Government accommodation allotted to him under SR 317-B-11 (1) beyond the concessional period of two months allowed under sub-r. (2) thereof the liability to pay damages equal to the market rent for the period of his unauthorised occupation is not a contingent liability. It is urged that the High Court was in error in holding that the appellant was not entitled to deduct Rs. 20, 482 78p. from the commuted pension payable to the respondent because of the failure of the Directorate of Estates to serve the respondent with a notice after the allotment of the flat in question stood automatically cancelled w. e. f. August 11, 1970. Secondly he submits that the construction placed by the High Court upon SR 317-B-22 was plainly erroneous It is submitted that the High Court was wrong in assuming

that there was some kind of estoppel operating against the Government and in proceeding upon the basis that recovery of damages equivalent to the market rent for use and occupation for the period of unauthorised occupation was punitive in nature and therefore the Court had power to grant relief against recovery of damages at that rate. These contentions must, in our opinion prevail.

6. It would be convenient here to set out the relevant statutory provisions. Sub-s. (2) of S. 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 invests the Estate Officer with authority to direct the recovery of damages from any person who is, or has at any time been, in unauthorised occupation of any public premises, having regard to such principles of assessment of damages as may be prescribed, R. 8 of the Public Premises (Eviction of Unauthorised Occupants) Rules, 1971 lays down the principles for assessment of such damages. Among other things, R. 8 (c) provides that in making assessment of damages for unauthorised use and occupation of any public premises, the Estate Officer shall take into consideration the rent that would have been realised if the premises had been let on rent for the period of unauthorised occupation to a private person Allotment of residential premises owned by Government in Delhi is regulated by the Allotment of Government Residences (General Pool in Delhi) Rules, 1963. Sub-r (1) of SR 317-B-11 provides inter alia that an allotment such premises to a Government office shall continue in force until the ex piry of the concessional period perm ssible under sub-r. (2) thereof afte the officer ceases to be on duty in a eligible office in Delhi. Sub-r. (2) SR. 317-B-11 provides that a residenc allotted to an officer may, subject sub-r. (3), be retained on the happe ning of any of the events specified Column 1 of the Table underneath fo the period specified in the correspon ding entry in Column 2 thereunder The permissible period for retentio of such premises in the event of tran sfer of the Government Officer to place outside Delhi is a period o two months. SR 317-B-22 insofar a material provides as follows :

> "Where, after an allotment ha been cancelled or is deemed to be cancelled under any provision containe in these rules, the residence remain or has remained in occupation of the officer to whom it was allotted or o any person claiming through him, such officer shall be liable to pay damages for use and occupation of the residence, services, furnitures and garden charges, equal to the market licence fee as may be determined by Government from time to time."

7. It is difficult to sustain the judgment of the High Court or the reasons therefor. The construction placed by the High Court on the two provisions contained in SR 317-B-22 and SR 317-B-25 is apparently erroneous. It is plain upon the terms of SR

17-B-25 that the liability to pay amages equal to the market rent eyond the concessional period is an bsolute liability and not a contingent ne. Both the learned single Judge s well as the Division Bench were learly in error in subjecting the liabiity of a Government Officer to pay arket rent for the period of nauthorised occupation to the ulfilment of the condition that he Director of Estates should serve im with a notice that in the event of is continuing in unauthorised occupaion he would be liable to pay market ent. They were also in error in proceeding upon the wrongful assumption that ince the Government had not recovered he rent at the market rate as permissile under SR 317-B-22 and allowed the espondent to continue in unauthorised ccupation for a period of nearly five years, it must be presumed that the Government had relaxed the conditon in favour of the respondent under SR 317-B-25 The view expressed by the High Court that there was a presumption of relaxation of the condition for payment of market rent under SR 317-B-22. due to inaction on the part of the Government, is not at all correct. For a valid exercise of relaxation, the condition pre-requisite under SR 317-B-25 is that the Government may relax all or any of the provisions of the Rules in the case of any officer or residence or class of officers or types of residences for reasons to be recorded in writing. There was no question of any presumption arising for the relaxation which had to be by a specific order by the Government for reasons to be recorded in writing. Nor was there a question of any promissory estoppel operating against the Government in a matter of this kind

8 In the facts and circumstances of the present case, the respondent had given a declaration in his application for allotment that he had read the Allotment of Government Residences (General Pool in Delhi) Rules, 1963 and that the allotment made to him shall be subject to the said Rules as amended from time. According to sub-r (3) of SR 317-B-11 the allotment was to continue till the expiry of the concessional period of two months under sub-r. (2) thereof after June 11, 1970, the date of transfer and thereafter it would be deemed to have been cancelled. It is not disputed that the respondent continued to remain in occupation of the premises unauthorisedly from August 11, 1970 even after his transfer outside Delhi. He was not entitled to retain any accommodation either general pool or the defence pool once he was transferred to a place outside Delhi. The respondent retained the flat in question at his own peril with full knowledge of the consequences. He was bound by the declaration to abide by the Allotment Rules and was clearly liable under SR 317-B-22 to pay damages equal to the market rent for the period of his unauthorised occupation. Before an estoppel can arise, there, must be first a representation of an existing fact distinct from a mere promise

made by one party to the other, secondly that the other party believing it must have been induced to act on the faith of it; and thirdly, that he must have so acted to his detriment. In this case, there was no representation or conduct amounting to representation on the part of the Government intended to induce the respondent to believe that he was permitted to occupy the flat in question on payment of normal rent or that he was induced to change his position on the faith of it. If there was any omission, it was on the part of the respondent in concealing the fact from the Director of Estates that he had been transferred to a place outside Delhi. There was clearly a duty on his part to disclos the fact to the authorities. There is nothing to show that he was misled by the Government against whom he claims the estoppel. It is some what strange that the High Court should have spelled out that the respondent being a Squadron Leader was an employee of the Central Government and therefore the Government of India to whom the Curzon Rood Hostel belongs must have had knowledge of the fact of his transfer. The entire judgment of the High Court proceeds upon this wrongful assumption.

9. In the premises, it is difficult to sustain the judgment of the High Court and it has to be reversed. Nonetheless, the writ petition must still succeed for another reason. It is somewhat strange that the High Court should have failed to apply its mind to the most crucial question involved, namely, that the Government was no competent to recover the amount of Rs 20, 482. 78p. alleged to be due and payable towards demages on account o unauthorised use and occupation o the flat from the commuted pensio payable to the respondent which wa clearly against the terms of S. 11 o the Pensions Act, 1871 which reads a follows :

"Exemption of pension from attac- hment :—

No pension granted or continue by Government on political considerations, or on account of past service or present infirm ities or as a compassionate allowance, and no money du or to become due on account of any suc pension or allowance, shall be liabl to seizure, attachment or sequestratio by process of any Court at the instance of a creditor, for, any deman against the pensioner, or in satisfactio of a decree or order of any such Court." According to its plain terms. S. 1 protects from attachment, seizure or sequestration pension or money due o to become due on account of any suc pension. The words "money due or t become due on account of pension" b necessary implication means money tha has not yet been paid on account o pension er has not been received by th pensioner and therefore wide enoug to include commuted pension. The controversy whether on commutation o pension the commuted pension becomes a capital sum or still retains th character of pension so long as it remains unpaid in the hands of the Gove rnment is not a new one till it was ettled by the judgment of this Court n Union of India v Jyoti Chit Fund z Finance, (1976) 3SCR 763. We nay briefly touch upon the eaeier decisions on the question. n an English case, in Crown v. Price, 1889) 58 LJ QB 215 it was held that noney paid to a retired officer of His Aajesty' force for the commutation f his pension does not retain its chracter as pension so as to prevent it rom being taken in execution. On). 217 of the Report, Coleridge, C. J. aid ;

"It is clear to me that commutaion money stands on an entirely diferent ground from pension money, nd that if an officer commuted his pension for a capital sum paid down, he rules which apply to pension money and make any assignment of it void do not apply to this sum.

Following the dictum of Coleridge, C. J.,Besley, CJ. and King, J in municipal Council, Salem v. B· Guruajah Rao. ILR 58 mad. 469 : (AIR 1935 Aadr 249) held that when pension or portion thereof is commuted, it ceases to be pension and becomes a capital sum. The question in that case was whether the commuted portion of the pension of a retired Subordinate Judge was income for purposes of assessment of professional tax under S.354 of the Madras District Municipalities Act, 1920. The learned Judges held that where pension is commuted there is no longer any periodical payment; the pensioner receives once and for all a lump sum in lieu of the periodical payments. The pension is changed into something else and becomes a capital sum. On that view they held that the sum received by the retired Subordinate Judge in lieu of the portion of his pension when it was commuted was no longer pension and therefore not liable to pay a professional tax under S 354 of the Madras District Municipalities Act. That is to say, the commuted portion of the pension was not income for purposes of assessment of professional tax in a municipality. The question arose in a different from in C. Gopalachariar v. Deep Chand Sowcar, AIR 1941 Mad. 207 and it was whether the commuted portion of the pension was not attachable in execution of a decree obtained by certain creditors in view of S. 11 of the Pensions Act. Pandurang Row, J. interpreting S. 11 of the Act was of the opinion that not only the pension but any portion of it which is commuted came within the provisions of the section. He particularly referred to the words "money due or to become due on account of pension" appearing in S. 11 of the Act which, according to him, would necessarily include the commuted portion of the pension. He observed that the phrase "on account of" is a phrase used in ordinary parlance and is certainly not a term of art which has acquired a definite or precise meaning in law. According to its ordinary commutation the phrase "on account of" means"by reason of" and he therefore queried:

"Now can it be said that the commuted portion of the pension is not money due on accont of the pension? Though the pension has been commuted, still can it be said that money due by reason of such commutation or because of such commutation, is not money due on account of pension?

He referred to S 10 of the Act which provides for the mode the commutation and is part of Chapter III which is headed "Mode of Payment" and observed :

"In other words, the commutation of pension is regarded as a mode of payment of pension If so, can it be reasonably urged that payment of the commutation amount is not payment on account of the pension itself, because atter commutation it ceases to be pension? I see no good reason why it should be deemed to be otherwise. No doubt money is due immediately under the commutation order, but the commutation order itself is on account of a pension which was commuted or a portion of the pension which was commuted. The intention behind the provisions of S.11, Pensions Act, is applicable to the commuted portion as well as to the uncommuted portion of the pension and the language of S. 11 does not appear to exclude from its protection the money that is due under a commutaion order commuting a part of the pension."

10. In Hassomal Sangumal v. Diaromal Laloomal, AIR 1942 Sind 19 Davis, C.J. speaking for a Divison Bench referred to Gopalachariar's case and pointed out that it does not lay down that once a pension has been commuted and the money paid over to the pensioner, the exemption from attachment still continues. The learned Chief Justice went on to say that the words "money due or to become due" used in S 11 must by necessary implication mean the money that has not yet been paid to the pensioner.

11. In Jyoti Chit Fund's case (AIR 1976 SC 1163) the Court repelled the contention that since the civil servant had already retired, the provident fund amount, pension and other compulsory deposits which were in the hands of the Government and payable to him had ceased to retain their character as such provident fund or pension under Ss. 3 and 4 of the Provident Funds Act, 1925 Krishna I yer, J speaking for himself and Chandrachud, J observed.

"On first principles and on precedent, we are clear in our minds that these sums, if they are of the character set up by the the Union of India, are beyond the reach of the Court's power to attach. S. 2 (a) of the Provident Funds Act has also to be read in this connection to remove posssible doubts because this definitional clause is of wide amplitude. Moreover, S. 60 (1) provisos (g) and (k), leave no doubt on the point or non-attachability. The matter is so plain that discussion is uncalled for.

We may state without fear of contradiction that provident fund amounts, pensions and other compulsory deposits covered by the provisions we ave referred to, retain their character intil they reach the hands of the mployee. The reality of the protection is reduced to illusory formality if ve accept the interpretation sought."

12. The learned Additional Soli-itor General has very fairly brought o our notice Circular No. F. 7 (28) EV/53 dated August 25, 1985 issued by he Government of India, Ministry of Finance to the effect :

"When a pensioner refuses to pay Government dues—

The failure or refusal of a pensioner to pay any amount owned by him o Government cannot be said to be nisconduct' within the meainng of Art. 351 of the the C. S- R. (Rule 8, C. C. S. (Pension) Rules, 1972) The ossible way of recovering/demanding Government dues from a retiring offi-er who refuses to agree in writing, to uch dues being recovered from his ension is either to delay the final anction of his pension for some time which will have the desired effect for ersuading him to agree to recovery eing made therefrom or take recou-se to Court of law."

It bears out the construction that he words "money due or to become lue on account of pension" occur-ing in S. 11 of the Pension Act, 1871 nclude the commuted portion of the ension payable to an employee after is retirement. It must accordingly be eld that the Government had no uthority or power to unilaterally de-luct the amount of Rs. 20, 482. 78p. from the commuted pension payable to the respondent, contrary to S. 11 the Pensions Act 1871 of

13. For these reasons, the appeal partly succeeds and is allowed. The judgment and order of the High Court are set aside: We allow the writ petition filed by the respondent in the High Court and direct that a writ of mandamus be issued ordering the Central Government to refund the amount of Rs. 20, 482. 78p. deducted from the commuted pension paid to the respondent. The Government shall be at liberty to initiate proceedings under S. 7 (2) read with S. 14 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 for recovery of Rs. 20, 482. 78p. due on account of damages for unauthorised use and occupation of the flat in question from the respondent as arrears of land revenue or have recourse to its remedy by way of a suit for recovery of damages.

14. Before parting with the case, we wish to add a few words. The Government should consider the feasibility of dropping the proceedings for recovery of damages, if the respondent were to forego his claim for interest. In this case, the deduction of the amount of Rs. 20, 482. 78p. from the commuted pension payable to the respondent was made as far back as October 30, 1976, since then 10 years have gone by. Even if interest were to be calculated at 9% per annum, the interest alone would aggregate to more than Rs. 18,000 Since

the Government had the benefit of the money for all these years, it may not be worth-while in pursuing the matter any further.

15. There shall be no order as t
costs.

A. P. Sen
Judge
Supreme Court of India

Order accordingly

M. Dutt
Judge
Supreme Court of India

OBSERVATION

(A) All India Services Act (61 of 1951), S. 3—All India Services (Confidential olls) Rules (1970), R 2 Cls. (e), (f) and (a)—Inspector General of Police, Haryana Is head of Police Department—Writing of confidential report by Home Secretary State, on his work and conduct—Not proper. (Police Act (5 of 1861), Ss. 3, ; (Punjab Police Rules (1934), R. 1. 2); (Constitution of India, Art. 166); usiness of the Haryana Government (Allocation) Rules (1974), Rr. 1 to 4 Sch. em 17).

(B) All India Services Act (61 of 1951), S. 3—All India Services (Confidential olls) Rules (1970), Rr. 5 6, 6-A, 7—Adverse remarks—Communication of—Provisi- s of Rr. 5, 6, 6-A and 7 are directory—Substantial Compliance is sufficient— ordinate delay in communicating adverse remarks—Held, not proper.

OBSERVED BY

O. Chinnappa Reddy And Murari Mohon Dutt,

Hon'ble Judges Supreme Court of India.

IN

Civil Appeal No 4395 of 1986 decided on 16-4-1987 between State of Haryana, ppellant v. Shri P. C. Wadhwa, IPS, Inspector General of Police and another, espondents.

TEXT

Dutt, J. :– This appeal by spec- l leave has been preferred by the tate of Haryana against the judgment f the Division Bench of the High ourt of Punjab & Haryana whereby e Division Bench has set aside the dgment of a learned single Judge f the High Court dismissing the writ etition of the respondent Shri P. C. adhwa, a member of the Indian olice Service, who was the Inspector eneral of Police, Haryana, from June 0, 1979 to July 25, 1980.

2. It appears that certain adverse emarks were made by the Home ecretary to the Government of Haryana against Shri Wadhwa, the Inspector General of Police for the said period. The adverse remarks were duly accepted by the competent authorith under the All-India Services (Confidential Rolls) Rules, 1970, hereinafter referred to as 'the Rules'. After such acceptance, the adverse remarks were communicated to Shri Wadhwa by the Home Secretary by his letter dated May 4, 1982, about two years three months after the close of the relevant period on March 31, 1980. The respondent did not make any representation against the adverse remarks to the reviewing authority under the

Rules. Instead, he chose to file a writ petition before the Punjab & Haryana High Court challenging the authority of the Home Secretary to write a confidential report assessing the performances, character, conduct and qualities of the respondent at the Inspector General of Police and prayed for the quashing of such report or adverse remarks.

3. A learned single Judge of the High Court took the view that as the Home Secretary was specifically empowered by the State Government as the reporting authority under Rule 2 (e) of the Rules, he had the authority to write the report or to make adverse remarks against the performances of Inspector General of Police, Haryana. In that view of the matter, the learned single Judge dismissed the writ petition. Being aggrieved by judgment of the learned single Judge, the respondent filed an appeal against the same to the Division Bench of the High Court and as stated already, the Division Bench set aside judgment of the learned single Judge and allowed the writ petition holding, inter alia, that the Home Secretary had no authority to submit any report agains the performances of the respondent for the aforesaid period during which he was the Inspector General of Police, Haryana. Hence this appeal by special leave by the State of Haryana.

4. The only point that is involved in this appeal is whether the State Government was justified in specifically empowering the Home Secretary as the reporting authority for the puspose o writing a confidential report in respec of the Inspector General of Police Section 3 of the All-India Services Act 1951 empowers the Central Government to make rules for the regulatio of recruitment, and the conditions o services of persons appointed to an All-India Service By virtue of Section 3 the Central Government framed th Rules. Under Rules 1 (3), the Rule shall apply to the writing and the maintenance of the confidential reports o the members of the Service clauses (e) (f) and (a) of Rules 2 of the Rules ar as follows :–

“2. Definitions— In these rules unless the context otherwise requires :-

... ...

... ...

(e) ‘reporting authority’ means th authority who was, during the perio for which the confidential report i written, immediately superior to th member of the Service and such othe authority as may be specifically empowered in this behalf by the Government

(f) ‘reviewing authority’ means th authority who was, during the perio for which the confidential report i written, immediately superior to th reporting authority and such othe authority as may be specifically empowered in this behalf by the Governmen

(a) ‘accepting authority’ means th authority who was, during the perio for which the confidential report is written, immediately superior to the reviewing authority and such other authorit as may be specifically empowered i is behalf by the Government;"

5. In this connection, it may be ointed out that it is not disputed that he conjunction 'and' occurring in calu- es (e), (f) and (a) should be read as 'or'. Jnder clause (e), the 'reporting author- ty, may be either immediately superior o the member of the Service or such ther authority as may be specifically mpowered in this behalf by the Gover- nment. The expression 'immediately uperior' obviously indicates that the eporting authority should be the imm- diate superior officer in the same Ser- ice to which the member of the Service elongs. The position is the same as n the cases of 'reviewing authority' nd 'accepting authority'. So, under he first part of clause (e), the reporting uthority of the respondent could be person who is immediately superior o him in the Police Service. At this tage, it is necessary to refer to Sections 3 and 4 of the Police Act, 1861, Sec- ions 3 and 4 are as follows :—

"Section 3. The superintendence f the police throughout a general olice-district shall vest in and shall be exercised by the State Government to which such district is subordinate; and except as authorized under the pro- visions of this Act, no person, officer, r Court shall be empowered by the State Government to supersede, or con- trol any police functionary."

"Sections 4. The administration of the police throughout a general police-district shall be vested in an officer to be style the Inspector-General of Police, and in such Deputy Inspector-General and Assistant Inspectors-General as to thc State Government shall deem fit.

The administration of the police throughout the local jurisdiction of the Magistrate of the district shall, under the general control and direction of such Magistrate, be vested in a District Superintendent and such Assistant District Superintendents as the State Government shall consider necessary.

6. It is clear from Sections 3 and 4 that the administration of the police throughout a general police-district shall be vested in the Inspector General of police. The position and status of the Inspector General of Police have been described in Rule 12 of the Punjab Police Rules, 1934, Volume 1, Rule 1.2 provides as follows :—

"Rule 1.2. The responsibility for the command of the police force, its recruitment, discipline, internal economy and administration throughout the general police district vests in the Inspector General of Police. He is head of the Police Department, and is responsible for its direction and control and for advising the Provincial Government in all matters connected with it. In the discharge of his duties as Inspector-General and in the execution of order of Government he is bound to act in conformity with the system and regulations regarding the functions, discipline and administration of the force contained in the Police Act (V of 1861) and in these rules. Order of the

Provincial Government affecting the Police force in whole or in part, will be issued through him.

Inspector-General is assisted in the control and administration of the police force by such number of Deputy Inspectors-General and Assistant Inspector-General as the Provincial Government may from time to time appoint."

7. Under Rule 1.2, the Inspector General of Police is the head of the Police Department and is responsible for its direction and control and for advising the Provincial Government in all matters connected with it. Thus, the Inspector General of Police being the head of the Police Department, there is no immediately superior officer to him in the Police Service, consequently the first part of clause (e) will not have any application to the respondent.

8. Now the question is whether State Government can specifically empower any authority to be the reporting authority of the Inspector General of Police under the second part of clause (c) Apart from any legal provision, it is just and proper that a reporting authority must be a person to whom the member of the Service is answerable for his performances. In other words, the reporting authority should be a person higher in rank than the member of the Service. Indeed, that is apparent from the first part of clause (e). It is true that under the second part of clause (e), there is no indication as to the status and position of the authority who may be specifically empowered by the Government as the reporting authority, but from the point of view of propriety and reasonableness and having regard to the intention behind the rule which is manifest, such an authority must be one superior in rank to the member of the Service concerned. If that be not so, there will be an apparent conflict between the first part and second part of clause (c). We are, therefore, of the view that the State Government can specifically empower only such authority as the reporting authority as is superior rank to the Inspector General of Police.

9. It is, however, submitted by Mr Nariman, learned Counsel appearing on behalf of the State of Haryana, that the Home Secretary is the head of the Police Department under the Business of the Haryana Government (Allocation) Rules, 1974, hereinafter referred to as the Business Rules. The Business Rules have been framed by the Haryana Government in exercise of the power conferred by clauses (2) and (3) of Article 166 of the Constitution of India Rules 1 to 4 of the Business Rules are as follows :—

"1. These rules may be called the Business of the Haryana Government (Allocation) Rules, 1974.

2 The Business of the Government of the State of Haryana shall be transacted in the Departments specified in the Schedule annexed to these rules and shall be classified and distributed among those Departments as laid down therein.

3. The Governor shall, on the advice of the Chief Minister, allot-

nong the Ministers the busines the Government by assigning one more departments to the Charge of Minister.

Provided that nothing in this rule all prevent the assigning of one epartment to the charge of more an one Minister.

4. Each Department of the Secre-riat to the Government, who shall be e official head of that Department, id of such other officers and servants ıbordinate to him as the State Gover-ment may determine;

Provided that:—

(a) more than one Department ay be placed in charge of the same ecretary; and

(b) the work of a Department may e divided between two or more ecretaries."

10. Rule 2 provides inter alia that he business of the Government f the State of Haryana shall be ransacted in the Departments specified n the Schedule. Under rule 4 each epartment of the Secretariat shall f the Secretary to the Government, vho shall be official head of that epartment. In the Schedule to the usiness Rules, Item No. 17 under the ome Department inter alia relates to 'Police, Railway police and P.A.P." Much reliance has been placed by the earned Counsel for the State of aryana on rule 4 read with Item No. 17. It is submitted by him that the ome Secretary being the head of the ome Department and as the Police Department has been placed under the Department, the Home Secretary must necessarily be the head of the Police Department. We are unable to accept this contention. The Business Rules have been tramed under clauses (2) and (3) of Article 166 of the Constitution for the more convenient transaction of the business of the Government of Haryana and for the allocation of business among the Ministers. Under Rule 4, the Secretary of each Department of the Secretariat is the head of that Department. Thus, the Secretary of the Home Department is the head of the Home Department being a Department of the Secretariat; but merely because he has to conduct the business, on behalf of the Government of the Police Department he does not thereby become the head of the Police Departmet. Item No. 37 under the General Administration Department in the Schedule relates to Judges of the High Court and officers of the Superior Judicial Service. The Chief the Government of Haryana is the head of the General Administration Department by virtue of Rule 4 of the Business Rules. But that does not mean that the Chief Secretary is also the head of the Administration relating to the Judges of the High Court and officers of the Superior Judicial Service. Similarly, Item No. 21 of the General Administration Department relates to Council of Ministers and its Committees. Surely, the Chief Secretary has no authority whatsoever on the Council of Ministers and its Committees. There is, therefore, no substance in the conten-

tion made on behalf of the appellant that as police, Railway police and P.A.P. have been placed under the Home Department, the Secretary of the Home Department is the head of the Police Department by virtue of Rule 4 of the Business Rules. The Rules of Business that have been framed under Article 166 cannot override the provisions of the Act or any statutory rules. Indeed, the Business Rules also do not attempt to override Rule 12 of the Punjab Police Rules, for it cannot. There is much substance in the contention made by the respondent appearing in person and Mr. Garg, learned Counsel appearing on behalf of the intervenor, the IPS Officers' Association, that the Business Rules framed under Article 166 cannot be relied upon for the purpose of interpretating the provision of clause (e) of Rule 2 of the Rules.

11. In view of sections 3 and 4 of the Police Act read with Rule 1, 2 of the Punjab Police Rules, the Inspector General of Police, Haryana, is the head of the Police Department. The immediate authority superior to the Inspector General of Police is the Minister-in-Charge of the Police Department. The only authority who could be specifically empowered as the reporting authority in regared to the Inspector Genetal of Police under clause (e) of Rule 2 of the Rules is the Minister-in-charge and the Chief Minister, being superior to the Minister-in-Charge, may be the reviewing authority under clause (f) of Rules 2, In acting as the reporting authority the M nister-in-Charge may be assisted by t Home secretary, but the confidenti report relating to the performances the Inspector General of Police has be written by the Minister-in-Char The Minister-in-Charge of the Poli Department is supposed to be awa of the performances of the Inspect of Police. As the Chief Minister the reviewing authority, he will al act as the accepting authority on t basis of the principle as laid do under Rule 6B of the Rules provi ing that where the accepting author writes or reviews the confidential re ort of any member of the Service, shall not be further necessary to re iew or accept any such report. other words, the Chief Minister w act both as the reviewing author writes or reviews the confidential port of any member of the Servi it shall not be further necessary review or accept any such report. other words, the Chief Minister w act both as the reviewing author and the accepting authority.

12. In this connetion, we m notice the statements made in the w petition filed by the respondent in t High Court of Punjab & Harya It has been stated in paragraph that reports of the work and condu of the various secretaries to the Gov nment are written and recorded by t Minister-in-Charge of the Departme concerned and not even by the Ch Secretary so that the Minister-in-Char of the Departments concerned a

the 'immediate superior' authorities to the Secretaries concerned within the meaning of Rule 2 (e) of the Rules. Further, it has been stated that before independence the report on the work and conduct of the Inspector General of Police, Punjab, was being recorded by the Minister-in-chage of the Department and such a position continued even after the independence till 1974 when the Haryana state Government passed the order dated May 3, 1974 under clause (e) of Rule 2 of the Rules, inter alia, specifically empowering the Home Secretary as the reporting authority for writing out the confidential reports in regard to the Inspector General of Police, Haryana. The statements made in paragraph 14 have not been denied by the State of Haryana in its counter-affidavit filed in the High Court. The Division Bench of the Court was, therefore, perfectly justified in quashing the confidential report written by the then Home Secretary to the work and conduct of the respondent, Shri Wadhwa.

13. Before we part with this appeal, we may dispose of another contention of the respondent about the delay in communicating to him the impugned adverse remarks. Under Rule 5 of the Rules, a confidential report assessing the performances, character, conduct and qualities of every member of the service shall be written for each financial year, or calendar year, as may be specified by the Government, ordinarily within two months of the close of the said year. Rule 6 provides that the confidential report shall be reviewed by the reviewing authority ordinarily within one month of its being written. Under Rule 6A, the Confidential report, after review, shall be accepted with such modification as may be considered necessary, and countersigned by the accepting authority, ordinarily within one month of its review. Thus, the whole process from the writing of the confidential report to the acceptance there of has to be completed ordinarily within a maximum period of four months. Further, under Rule 7 the adverse remarks, if any, in a confidential report shall be communicated to the officer concerned within three months of the receipt of the confidential report. Thus, a total period of seven months has been laid down as the maximum period within which adverse remarks, if any, has to be communicated to the officer concerned. It has been already noticed that the adverse remarks were sent to the respondent after two years three months, that is, after twenty seven months of the close of the year. It is submitted by the respondent that in view of the delayed communication, the adverse remarks lost all importance and should be struck down on that ground.

14. The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performances, canduct or character, as the case may be. The adverse remarks should not be understood in terms of punishment, but really it should be taken as

M. Dutt
Judge
Supreme Court of India

an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career. The whole object of the making of adverse remarks would be lost if they are communicated to the officer concerned after an inordinate delay. In the instant case, it was communicated to the respondent after twenty seven months. It is true that the provisions of Rules 5, 6, 6A and 7 are directory and not mandatory, but that does not be complied with even substantially. Such provisions may not be complied with strictly and substantial compliance will be sufficient. But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In the instant case, while the provisions of Rules 5, 6, 6A and 7 require that everything including the communication of th adverse remarks should be complete within a period of seven months this period cannot be stretched t twenty seven months, simply because these Rules are directory, without serving any purpose consistent with the spirit and objectives of these Rules. We need not, however, dilate upon the question any more and consider whether on the ground of inordinate an unreasonable delay, the adverse remark against the respondent should be struck down or not, and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent.

15. For the reasons aforesaid, this appeal is dismissed. There will, however, be no order as to costs.

Appeal dismissed

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O. Chinnappa Reddy
Judge
Supreme Court of India

OBSERVATION

(A) Employment Exchanges (Compulsory Notification of Vacancies) Act (31 1959), Pre , S. 2 (f)—Scope—Definition of "establishment in public sector—Inclu- s Govt. offices also–Act is applicable to Govt. establishments. 1986 Lab IC 182 ndh Pra). Reversed.

(B) Employment Exchange (Compulsory Notification of Vacancies) Act 31 of 59), Pre., S. 4 (4)—Scope–Act does not oblige any employer to employ those rsons only who have been sponsored by employment exchanges.—Constitution of dia, Art. 73).

(C) Employment Exchange (Compulsory Notification of Vacancies) Act (31 of 59), Pre., Ss. 2, 4—Scope—Employment in Govt. Departments—Any restrictions at it should be through medium of employment exchanges—Does not offennd Arts. and 16 (Constitution of India, Arts. 14, 16).

OBSERVED BY

O Chinnappa Reddy And Murari Mohon Dutt,
Hon'ble Judges Supreme Court of India

IN

Civil Appeals nos. 9-15 of 1986 (With Spl. Leave Petn. (Civil) No. 4517 of 86) with Civil Misc. Petns. Nos. 4026-27, 5558 and Writ Petn. No. 1183 of 1986), cided on 13-4-1987, between Union of India and others, etc., Appellants v. N. argopal and others, etc., Respondents.

TEXT

Chinnappa Reddy, J. :— The ques- on raised in these appeals is whether ‘establishment in the public sector’ an ‘establishment in the private sec- r’ as defined in the Employment Ex- anges (Compulsory Notification of acancies) Act, 1959 may make appo- tments to posts to which the Act plies, of persons not sponsored by the mployment Exchanges? A further que- ion is whether the Act covers Govern- ent establishments also? A Division ench of the High Court of Andbra radesh has held that the Act has no application to Government establishments, that the Act casts no obligation either on the public sector establishment or on the private sector establishment to make the appointments from among candidates sponsored by the employment exchanges only and that any insistence that candidates sponsored by the employment exchanges alone should be appointed would be contrary to the right guaranteed by Arts. 14 and 16 of the Constitution. The learned Additional Solicitor General appearing for the Union of India argued that the object and the scheme of the Employment Exchanges (Compulsory Notification of Vacancies) Act and the instructions issued by the Government of India from time to time left no option to the employers but to confine their field of choice to candidates sponsored by the employment exchanges. It was argued that such insistence that appointments should be made from candidates sponsored by the employment exchanges only did not offend Arts. 14 and 16 of the Constitution. He also argued that the Act was appilcable to Government Establishments also.

2. We may refer to the provisions of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 without further ado. The title of Act itself suggests that the compulsion is in regard to notifying of vacancies only and nothing more. The preamble to the Act, like the title of the Act, also does not suggest any compulsion in the making of appointments, but only in the notifying of vacancies. The preamble says "An Act to provide for the compulsory notification of vacancies to employment exchanges." Section 2(e), (f) and (g) defines "establishment", "establishment in public sector" and "establishment in private sector" as follows :—

"(e) "establishment" means —

(a) any office or.

(b) any place where any industry, trade, business or occupation is carried on;

(f) "establishment in public sector" means an establishment owned, controlled or managed by —

(1) the Government or a depa
ment of the Government;

(2) A Government company as de
ned in S. 617 of the Companies A
1956;

(3) A corporation (including
cooperative society) established by
under a Central Provincial or Sta
Act, which is owned, controlled
managed by the Government;

(4) A local authority,

(g) "Establishment in private s
tor" means an establishment which
not an establishment in public sect
and where ordinarily twenty five or mo
persons are employed to work f
remuneration."

The High Court thought that t
definition of "establishment in publ
sector" as meaning an establishme
owned, controlled or managed by th
Government or a Department of t
Government indicated that an establis
ment in public was something differe
from the Government or a Departme
of Government and did not include t
Government or Department or Depar
ment of the Government. It had t
be something which could be owne
controlled or managed by the Govern
ment or a department of the Govern
ment. The High Court also though
that the expression 'public sector' wa
used in contradiction to 'private secto
and that it could not include office
of the Government. The expressio
would only take in an agency or instru
mentality of the State, but not th
State itself. We are unable to agre
with the conclusion of the High Cour

n this part of the case. If the definiion of 'establishment' which includes n 'office' is read alongside the definiion of 'establishment in public sector', t will be clear that Government offices re also included in the expression establishment in public sector'. That s the interpretation which the Governnent itself is advancing before us and hat is how the Government has always nderstood the provision during these hree decades as will be evident from he instructions issued by the Governnent from time to time to which we hall be referring later in the course of ur judgment We are unable to agree vith the view of the High Court that he Act is not applicable to Governnent establishments.

3. Section 3 of the specifies posts, acancies to which the Act does not pply. Section 4 provides for the notiication of vacancies to employment xchanges. It is desirable to extract the whole of S. 4 which is as follows :–

"4. (1) After the commencement of this Act in any State or area thereof, the employer in every establishment in public sectoı in that State or area shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed.

(2) The appropriate Government may, by notification in the Official Gazette, require that from such date as may be specified in the notification, the employer in every establishment in private sector or every establishment pertaining to any class or category of establishment in private sector shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchange as may be prescribed, and the employer shall thereupon comply with such requisition.

(3) The manner in which the vacancies referred to in sub-s (1) or sub-s. (2) shall be notified to the employment exchange and the particulars of employments in which such vacancies have occurred or are about to occur shall be such as may be prescribed,

(4) Nothing in sub-ss. (1) and (2) shall be deemed to impose any obligation upon any employer to recruit any person through the employment exchanges to fiill any vacancy merely because that vacancy has been notified under any of the sub-section." Section 5 deals with the duty of the employees to furnish information and returns in prescribed forms. Section 6 provides for official access to records and documents. Section 7 provides for penalties. Section 8 deals with cognizance of offences. Section 9 provides for protection of action taken in good faith. Section 10 vests the rule -making power in Central Government.

4. It is evident that there is no provision in the Act which obliges an employer to make appointments through the agency of the employment exchanges. Far from it. Section 4 (4) of the Act, on the other hand, makes it explicitly clear that the employer is under no obligation to recruit any per-

son through the employment exchange to fill in a vacancy merely because that vacancy has been notified under S. 4 (I) or S. 4 (2). In the face of S. 4 (4), we consider it utterly futile for the learned Additional Solicitor General to argue that the Act imposes any obligation on the employers apart from notifying the vacancies to the employment exchanges. The learned Additional Solicitor General invited our attention to the speach of the Minister of Labour and Employment and Planning (Shri Nanda) made at the time of the introduction of the Employment Exchanges (Compulsory Notification of Vacancies) Bill. Far from being of any assistance to the learned Additional Solicitor General, the speech appears to be against his submimission. In his speech, the Minister quoted from the report of the Training and Employment Services Organisation Committee and observed that the recommendation of the Committee offered a full explanation of the provisions of the Bill. The recommendation of the Committee which he quoted was, "Though we have not, for the present, recommended compulsion on private employers to recruit through the employment exchanges, we recommend that they be required on a compulsory basis to notify to the exchanges all vacancies, other than vacancies for unskilled categories, vacancies of very temporary duration and vacancies proposed to be filled through promotion." The Minister further said, "The main thing is that an obligation is being placed that after this legislation become operative, from that date, the employer in every establishment in the public sector shall, before filling up an vacancy in any employment in tha establishment, notify that vacancy t such employment exchanges as ma be prescribed. And so far as the private sector is concerned, there is thi further qualification that the Government concern may specify by notification that the employer in every establishment in private sector or ever establishment pertaining to any class or category of establishment in private sectors shall, before filling up any vacancy in any employment in that establishment, notify that vacancy tc such employment exchanges as may be prescribed. This is the kernel o this provision. This is the main object that is, an obligation placed on the employer to notify the vacancie that may occur in their establishment before filling these vacancies.' The Minister was conscious that there was a likelihood of the Bill being misunderstood as compelling the employers to make appointments through the employment exchanges only. He clarified the position saying "The misunderstanding is as this Bill gives power to the Government to compel the employers to recruit only such persons as are submitted by the employment exchanges. That is is not so. This compulsion extends only to notification of vacancies. Naturally the employer has to consider the names which are submitted

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the employment exchanges but there
io compulsion that they must restrict
the choice only to the least that
submitted to them Of course, there
also the objection from the other
e that it may not go far enough.
e believe that even this will make
ngs very much better. In any case,
ıen the Committee reported, they also
ggested this much in advance. At
esent, they said, we should have only
mpulsory notification, but not com-
l the employers to recruit only out
the least that is sent by the employ-
ent exchanges."

5. As we said the speech of the
inister, at the time of the introdu-
on of the Bill, is totally destructive
the contention of the learned Addi-
onal Solicitor General that the employ-
s are under an obligation to recruit per-
ns for appointment through employm-
t exchanges only The learned Additi-
ıal Solicitor General requested us to
ve a purposive interpretation to the
ovisions of the Act and insist that em-
oyers, in making appointments, sho-
d restrict their field of choice to
ndidates sponsored by the employ-
ent exchanges. We are unable to
opreciate the argument since there is
provision of the Act which requ-
es interpretation by us and which
e may reasonably interpret as Com-
elling the employer to appoint persons
onsored by the employment excha-
ges. On the other hand, we have
ready referred to S. 4 (4) which is
plicit that there is no such obliga-
on on the part of the employer.

We also notice that the object of the Act is not to restrict the field of choice in any particular manner, but to enlarge the field of choice. That is why in this introductory speech, the Minister said, "......a large number of employers, particularly in similar industrial establishment and in construction works, do not employ any scientific method, but depend for their supply of labour on agents or recruit in a haphazard manner from those assembled at factory gates or at works sites. The methods adopted are not always dicated by a consideration of efficient service, but as more a matter of bestowing partonage and favour. This applies in varying degrees to a larger number of "employers." The minister discussed the existing position and anticipated position in the following words :—

"The Act of notification of vacancies has importont consequences. In the first place so far as the employer is concerned, he will be placed in a position to have a much wider choice for the purpose of selection. Now, what is the present position? Any person knocks at the gate of the factory or the mill or other establishment and from those few who are they there choose. Now it would be possible for them to have a wider area of selection. The names of so many others who may not be able to go and knock at every gate can be submitted and out of them, the best can be selected. So far as the quoting of selection is concerned. It should improve because of the wider range of choice. On the side of the worker certainly it means a more equitable distribution of employment opprtunities. It should not be necessary for a person to be all the day moving from place to place. It should be sufficient for him to register at a place. give all the particulars about his qualifications and then he should be sure that at any rate, his name will be considered along with other names and there will be some regard for fitness in the choice of people who enter these new places for employment."

6. It is, therefore, clear that the object of the Act is not to restrict but to enlarge the field of choice so that the employer may choose the best and the most efficient and provide an opportunity to the worker to have his claim for appointment considered without the worker having to knock at every door for employment. We are, therefore, firmly of the view that the Act does not oblige any employer to employ those persons only who have been sponsored by the employment exchanges.

7. The next question for consideration is whether the instructions issued by the Government from time to time have the effect of compelling the employers to restrict their field of choice to candidates sponsored by the employment exchanges. We may straightway refer to some of the instructions on which reliance was placed by the learned Addition Solicitor General. In O.M. No. 14/1 64-Estt (D) dated March 21, 1964, t Ministry of Home Affairs addressed the ministries regarding recruitment staff through the agency of the Nation Employment Service and the utilisati of employment exchanges by quasi gov rnment institutions and statutory orga isations. It is enough if we extra paragraphs 1, 4 and 5 of this communi ation which are as follows :—

"1. The undersigned is directed say that in paragraph 6 of t Ministry's Office Memorandum N 71/40-DGS (Apptts) dated the 11 December, 1949 (copy enclosed) it w laid down that all vacancies in Centr Government Establishments, other tha those filled through the Union Publ Service Commission should be notifi to the nearest employment exchan and that no Department or offi should fill any vacancy by direct r cruitment unless the employme exchanges certified that they we unable to supply suitable candidate Subsequently in this Ministry's Offi Memorandum Nos. 71/49-DGS(Apptt dated 30th January, 1951 and 71/222/5 CS(C) dated the 14th December, 19 (copy enclosed). The Ministry Finance etc. were requested to iss immediate instructions to all qua Government institutions and statuto organisations with which they we concerned asking them to fall in lin as far as possible, with the Centr Government establishments in t matters of recruitments, by suitab

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ıending their recruitment rules or
opting resolutions to achieve this
ject if necessary. The Ministries
ere also requested to impress upon
ese institutions that it was in their
vn interest as well as in the interest of
e country as a whole that recruitment
ould be made through the employm-
ıt exchanges, as a large number of
perienced and trained hands were
vailable on their registers and the need
r tapping other sources of recruitment
ould arise only if the employment
xchange has certified that they were
nable to nominate suitable recruits
rom their registers.

4. Under the EE(CNV) Act,
ecruitment of staff through the emplo-
ment service is voluntary so far as the
rivate sector is concerned. Even, so,
fforts are made by the empoyment
ervice to persuade the private sector to
ccept candidates sponsored by the
mployment exchanges. The Dirctor-
te General of Employment and
raining are placed in a very embar-
assing situation when they have
o approach the State Governme-
ts and establishments in the private
ector to utilise the employment
ervice in filling up the vacancies, when
ome establishments in the public
ector do not recognise the Employm-
nt Service as the normal channel of
ecruitment.

5. It is accordingly requested
hat the Ministry of Finance etc, may
ssue instructions to all quasi-Governm-
nt institutions and statutory organisa-
ions with which they are concerned
requiring them to notify vacancies in the manner and form prescribed in R. 4 of the EE (CNV) Rules, 1960 to the prescribed employment exchange and to fall in line with the Central Government Departments in the recruitment of staff through the agency of the employment service. The need for issuing advertisements for inviting applications or tapping other sources of recruitment should be considered only if the employment exchanges issue non-availability certificates. A copy of the instructions issued by the Ministry of Finance etc., may kindly be endorsed to the Ministry of Home Affairs and the Directorate General of Employment and Training."

It will be noticed that in order to give effect to such instructions in the case of Quasi-Government institutions and statutory organisations, it would be necessary to suitably amend the recruitment rules or adopt resolutions to achieve that object. This is so mentioned in para 1. In Office Memorandum No. 14/22.65-Estt. (D) dated June 12, 1968, the Ministry of Home Affairs informed all the other Ministries:—

"The undersigntd is directed to say that in paragraph 6 of this Ministry's O. M. No. 71/49/DGS (Apptt) dated the 11 th December, 1949, it was laid down that all vacancies in Central Government Establishment, other than those filled through the Union Public Service Commission, should be notified to the nearest employment exchange that no Department or Office should fill any vacancy by direct recruitment unless the employment exchange certified that they were unable to supply candidates ”

8. In Office Memorandum No. 14024/2/77-Estt. (D) dated April 12, 1977, the Department of Personnel addressed all the Ministries/Departments and said.

“As the Ministry of Agriculture and Irrigation, etc. are aware, in accordance with the instructions issued by the Central Government (vide marginally-noted communications), all vacancies arising under Central Government Offices/establishments (including quasi-Government institutions and statutory organisations), irrespective of the nature and duration (other than those filled through the Union public Service Commission), are not only to be notified to, but also to be filled through, the Employment Exchange alone and other permissible sources of recruitment canbe tapped only if the Employment Exchange concerned issued a ‘non-availability’ certificate. There can be no departure from this recruitment procedure unless a different arrangement in this regard has been previously agreed to in consultaion with this Department and theMinistry of Labour (Directorate General of Employment and Training). Similar instructions are also in force requiring vacancies against posts carrying a basic salary of less than Rs.500/- p.m. in Central Public Employment Exchanges.”

9. It is clear that it is the desire of the Government of India that all Government Departments, Government Organisation and statutor bodies should adhere to the rule tha not merely vacancies should be notifie to the employment exchanges, but th vacancies should also be filled by cand dates sponsored by the employmer exchanges. It was only when no sui able candidates were available, the other sources of recruitment were to b considered. While the Government at perfect liberty to issue instruction to its own departments and organisa ions provided the instruction do not contravene any constitut onal provision or any statute, thes instructions cannot bind other bodie wich are created by statute and whic function under the authority of statut In the absence of any statutory presc iption the statutory authority may how ever adopt and follow such instructio if thinks fit. Otherwise, the Govern ment may not compel statutory bodie to make appointments of persons fro among candidates sponsored by emplo ment exchanges only. The questio of course, does not arise in the case private employers which cannot be s compelled by any instructions issued b the Government.

10. The further question is whet her the instructions issued by the Gov erment that in the case of Govermen Departments the field of choice shoul in the first instance, be restricted t candidates sponsored by the employ ment exchanges offend Arts. 14 an 16 of the Constitution. Shri P. Par meshware Rao, learned counsel app earing for some of the respondent

enuously urged that such a restrict-
would offend the equality clauses
the Constitution, namely, Arts. 14
l 16. He urged that when Parlia-
nt had gone into the question and
cided that there should be no com-
lsion in the matter of appointment
way of restriction of the field of
oice, it was not open to the Gover-
ent to impose such compulsion.
argued that it would be unreason-
le to restrict the field of choice to
se sponsored by the employment
changes. In a country so vast as there
lia, in a country where was so
ich poverty, illiteracy and ignorance
was not right that employment op-
rtunities should necessarily be chan-
lled through the employment exch-
ges when it is not shown that the
twork of employment exchanges is
wide, that it reaches all the cor-
rs of this vast country. He argued
at it is futile to expect that persons
ing in distant places could get them-
lves registered with employment ex-
anges situated far away. The sub-
ission of Shri Parmeshwara Rao is in-
ed appealing and attractive. Non-
heless, we are afraid we cannot up-
old it. The object of recruitment to
y service or post is to secure the
ost suitable person who answers the
mands of the requirements of the
b. In the case of public employment,
is necessary to eliminate arbitrar-
ess and favouritism and introduce
unifortmiy of standards and orderliness in the matter of employment. There has to be an element of procedural fairness in recruitment. If a public employer chooses to receive applications of employment where and when he pleases, and chooses to make appointments as he likes a grave element of arbitrariness is certainly introduced. This must uecessarily be avoided if Arts. 14 and 16 have to be given any meaning. We, therefore, consider that insistence of recruitment through employment exchanges advances rether than restricts the rights guaranteed by Arts. 14 and 16 of the Constitution. The submission that employment exchanges do not reach every where applies equally to whatever method of advertising vacancies is adopted. Advertisement in the daily Press, for example, is also equally ineffective as it does not reach everyone desiring employment. In the absence of a better method of recruitment, we think that any restriction that employment in Government Department should be through the medium of employment exchanges does not offend Arts. 14 and 16 of the Constitution. With this modification of the judgment of the High Court, the appeals and the special leave petitions are disposed of. No orders are necessary in the writ petition.

Order accordingly.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

port No.·42, p. 01

S. Natarajan
Judge
Supreme Court of India

OBSERVATION

Criminal P.C. (2 of 1974), Ss. 353, 354, 482,—Judgment—Disparaging remarks- ty of court before making such remarks.—Judgment of Kerala H.C. Reserved. ivil P. C. (5 of 1908), (O. 20 R. 4.)

OBSERVED BY

B.C. Ray And
S. Natarajan,
Hon'ble Judges Supreme Court of India.

IN

Criminal Appeal No. 109 of 1987, (arising out of SLP (Cri.) No. 2666 of 1986), cided on 3.3.1987, between S.K. Viswambaran, Appellant v. E. Koyakunju and ners, Respondents.

TEXT

Natarajan, J. :— This appeal by ecial leave is by Gazetted Police ficer to seek expunction of certain verse remarks passed against him the High Court of Kerala in an order ssed with reference to two Criminal scellaneous petitions filed by respndents 2 and 3 herein without issuing y notice to him and without hearing m.

2. The somewhat unusual circumsnces in which the appellant has been ade the victim of strictures by the igh Court may now be looked into. ne Chandrasekaran Pillai residing thin the limits of Karunagapally lice Station was charged under S. 2, I.P.C., for having committed the urder of his wife Komalavilli by first ating her and kicking her and than nging her in order to make it appear at it was a case of suicide. The accud's son aged about 12 years and a neighbour claimed to have witnessed the beating as well as the accused dragging the deceased to the western side of the house. A little later the son made bold to go into the house and found his mother hanging with a noose round her neck. He raised alarm and the neighbours including his maternal uncle came to the house and cut the rope and rendered first aid unsucessfully because Komalavalli had already died.

3. A report was given at Karunagapally Police Station and a case of "suspicious death" was registered and investigation was done by Shri T. P. Rajagopalan, Inspector of Police (respondent 2) who was examined as P. W. 16 in the sessions Trial against the accused. As the brother of deceased Komalavalli was not satisfied with the manner of investigation of the local police he filed a petition before the

Deputy Inspector General, Southern range. Under orders of the Deputy Inspector General the investigation was entrusted to the Crime Detachment in which the appellant was serving as a Deputy Supdt. of Police. The appellant took charge of the case and his investigation revealed that Komalavalli's death was due to homicide and not suicide. The appellant was in charge of the investigation of the case only from 26-1-1980 to 5-1-1981 and thereafter the further investigation was done by another police officer of the Crime Detachment who was examined as P W. 18 in the trial. The charge sheet was eventually filed by yet another officer viz., P.W. 19 an Inspector of Police.

4. The defence of the accused was that his wife Komalavalli had committed suicide and that he had not murdered her. In support of his defence the accused placed reliance upon the first investigating Officer, viz., p. W. 16 carrying out a cellophone tape test on the palms of Komalavalli and sending the cellophone tapes to the Forensic Science Laboratory to find out whether any fibres of coir rope were found in the cellophone tape and if so whether the fibres had come out of the coir rope used for hanging. The report of the Forensic Science Laboratory was that the cellophane tape contained fibres of coir which were similar to the coir rope used for the hanging. It was, therefore, contened that Komalavalli's death was due to suicide as otherwise fibres from the coir rope used for hanging would not have been found in th palms of her hands. To prove the des patch of the cellophane tapes to the Fo ensic Science Laboratory and the rece ipt of the report from the said Labora tory and its despatch to the Crim Detachment a Head Constable of Karu nagapally Police Station by name E Koyakunju (respondent 1) was examine as Defence Witness No. 2.

5. The Sessions Judge entertaine serious doubts about P.W. 16 carryin out the cellophone tape test to lift an fibres of coir sticking to the palms o Komalavalli and sending the tapes t the Forensic Science Laboratory an the bona fides of the exercise. We shal set out later the numerous suspiciou features noticed by the Sessions Judg regarding the conduct of P.W. 2 wit reference to the carrying out of the cellophone tape test and the despatch of the tapes to the Forensic Science Laboratory and the entrustment o the report to the Crime Detachment. For the present we will continue with the narrative so as to make known the circumstances which have led to the filing of this appeal.

6. After evaluating the prosecution evidence the Session Judge held that the prosecution had failed to prove the case against the accused beyond reasonable doubt and, therefore, gave him the benefit of doubt and acquitted him of the charge under S. 302, I. P.C. It is significant to note that the acquittal was not rendered in acceptance of the defence case that Komalavalli had committed suicide but because

ne Court felt that it would not be safe o act upon the evidence of P.W 2, the on and P.W. 3, the neighbour and onvict the accused for the offence of nurder.

7. In the course of his judgment ne Sessions Judge made severe cmmets against P.W. 16, the Inspector of olice, D.W. 2, Head Constable and nother Police P.C. 2599 and observed s follows :

"Therefore in my view this is a fit ase where appropriate action has to be aken against P.W. 16, D.W. 2 and P.C. 599 who wrote Ext. D14 for the reaons stated earlier. Otherwise indiscidline and the tendency to tamper with fficial documents and create false docments will set at naught the very purose of having a police establishment. Vhen one wing of the police establishnent tries to investigate properly and o book the culprit, P.W. 16, D.W. 2, nd P.C. 2599 were trying to neutralise ll the work that has been done by the Crime Detachment and to help the ccused to get an acquittal. This is a erious situation which the higher uthorities in the police department ave to take serious notice of and curb he tendency even in the beginning."

8. Aggrieved by the strictures assed by the Session Judge, the Inspecor (P.W. 16) and the Head Constable D.W. 2) filed criminal Misc. Petitions efor the High Court of Kerala for xpunging the adverse remarks made gainst them A learned single Judge of he High Court, without making any examination of the conduct of the petitioners before him and without considering whether the features noticed by the Sessions Judge warranted the adverse remarks or not went at a tangent and the appellant in the dock for having failed to place before the Court the scientific materials which P.W. 16 had obtained in the course of investigation to find out whether Komalavalli's death was due to suicide or homicide. The learned Judge had taken it for granted that P.W. 16 and D.W. 2 had acted in a blemishless manner and that the report of the Forensic Science Laboratory had been obtained through bonafide investigative process and it was the appellant who had schemingly kept back the crucial records from the notice of the Court in order to secure a conviction unjustly against the accused and as such the appellant should be reprimanded in no uncertain terms. The relevant portions in the judgment where the appellant who was examined as P.W. 17 in the Sessions Trial has been critised are as under :—

"(para 6.) P.W. 17, Dy. S.P., who conducted the investigation kept the above facts concealed purposely. If the report sent by the Assistant Director of Forensic Science Laboratory was made available to the court it would have gone a long way to establish innocence of the accused. So to foist a false case of murder on the account he did not send the report of the Assistant Director of Forensic Science Laboratory to the Court. He pleaded complete ignorance of the above examination when examined before court.

(para 8.) The part played by P.W. 17 is not beyond suspicion. He had purposely concealed materials which were favourable to the accused. It would appear that this officer was averse to scientific methods being made use of in investigation of crimes. His attempt was only to see that the accused is convicted in this case. This should not have been the approach of a senior officer like P. W. 17, who was investigating a very serious crime. The life and liberty of innocent persons should not be placed at the mercy of such unscrupulous officers. It will be proper for the higher officers in the department to look into this matter and take proper corrective measures for future guidance."

9. Stung by the remarks made against him without even hearing, the appellant has preferred this appeal to seek expunction of the remarks.

10. Now let us have a look at the distressing and suspicious features noticed by the Sessions Judge in the conduct of P.W. 16 and D.W. 2 in the "cellophone tape test" carried out by them and in obtaining the report of the Forensic Science Laboratory and the despatch of the opinion to the Crime Detachment. The relevant portions extracted from the judgment are as follows :—

(i) "The inquest report prepared by this witness (P.W. 16) does not show that he had seized any cellophone tape or coir that they were sent to the Forensic Science Laboratory;

(ii) "There are no documents to show that the tape and coir were taken into custody for the purpose of sending them to the Forensic Science Laboratory in the case diary;

(iii) "Normally any material to be examined by the Forensic Science Laboratory will be sent only through the court. Admittedly the cellophone tape and the coir were not sent through court. On the other hand it is stated that they were sent to the laboratory through a constable. But the case diary does not show that any constable was sent to the Forensic Science Laboratory for handing over these articles;

(iv) "P.W. 16 did not prepare any mahazar for seizure of any cellophone tape and inquest report also does not state anything about any tape said to have been affixed by him on the palm of the dead body and taken for the purpose of examination at the laboratory;

(v) "D.W. 1 Assistant Director of the Forensic Science Laboratory, Trivandrum examined by the defence to prove his report Exhibit D. 10 regarding the presence of small bits of coconut fibres bearing similarity to the coir rope that was also sent, had stated in cross examination "that even if the tape was affixed to the coir (instead of the palms) and then sent, it will contain the fibres similar to the one found on the coir;

(vi) "The investigation was taken over by the Crime Detachment on 26-11-1980, The cellophone tapes and the coir pieces are said to have been sent

P.W. 16 to the laboratory on 1-12-80
en he had ceased to be the Investi-
ing Officer ;"

(vii) "Even if he had taken any
lophone tape and coir pieces at the
e of inquest or thereafter and wanted
m to be examined by the laboratory
proper course for him would have
n to send them to the Dy. S.P. who
s investigating the case on 1-12-
30;"

(viii) D. W. 2, Head Constable,
nmoned and examined by the defence
prove the sending of the cellophone
es and coir to the laboratory and
report received from the laboratory
l stated "that there is no document
the Police Station to prove that
lophone tape or coir piece were sent
m Karunagapally Police Station to
Forensic Science Laboratory,
vandrum.

(ix) "He further stated that the
ort received from the laboratory
s sent to the Crime Detachment on
-1981 but claimed that there is noth-
to show that it was received by any
icer of the Crime Detachment Office.
e despatch register Ext. D 13 only
ows tnat a cover was handed over to
onstable for delivery to the Crime
tachment Office. But there is no
knowledgment to show that the cons-
ble had actually handed over the
me to the office of the Crime Detach-
nt at Quilon."

(x) "D.W. 2 produced a notebook
t. D. 14 said to have been maintained
the constable to whom this cover
s handed over for delivery at the
officer of the Crime Detachment. In this the curious aspect is that the entry regarding this handing over is written in a sheet of paper which is affixed in the note book as an extra sheet ... ... This entry Ext. D. 14 has been purposely manufactured for the purpose of this case and I have no doubt that it has been done at the instance of D.W. 2 the Head Constable and P.C. 2599 who wrote Ext. D. 14. Therefore the constable who wrote Ext. D 14 and DW 2 are equally responsible for this fraud".

(xi) The extent to which DW 2 would go to help the accused is evident from the fact that he voluntarily produced Ext. D. 17."

(xii) "Ext. D. 17 is a letter sent from the Forensic Science Laboratory to the S. I. on 15-11-1980."

This letter states that the sealed packet said to contain the M. Os. involved in Crime 220 of 1980 of Karunagapally Police Station were being returned unopened for want of forwarding note and certificate and hence the sealed packet may be resubmitted with proper forwarding note and certificate. At the bottom of this letter in vernacular it is written "cellophone tape." Except this vernacular writting there is nothing to show that the MOs referred to in Ext. D 17 were cellophone tape and coir piece . . . . As the packet sent from the Karunagapally Police Station was not opened, by the Forensic Science Laboratory, the writing in vernacular at the bottom of Ext. D. 17 could not have been written by anybody from the laboratory. It is a subsequent interpolation probably at the instance of **D** W. 2. This was also interfering with official documents and tampering with it by D W. 2 or somebody from the Police Station at Karunagapally.

11. It was with reference to all these features the Sessions judge made his adverse remarks against P. W 16, D.W 2 and P. C. 2599 and observed that the conduct of the concerned official was highly open to suspicion, that as such a full-fledged enquiry should be held against them and that "other wise indiscipline and the tendency to tamper with official documents and create false documents will set at naught the very purpose of having a police establishment."

12 Coming now to the merits of this appeal when P. W 16 and D W. 2 moved the High Court for expunging the adverse remarks against them the scope of the enquiry was confined to the bona fides their action in the investigation proceeding and whether the Sessions Judge was justified in drawing adverse inferences against them on the basis of suspicious features catalogued by him. The High Court was not dealing with an appeal against the acquittal of the accused and there was no need or occasion for the High Court to go into the conduct of the appellant. The enquiry in the criminal misc. Petitions was only touching upon the conduct of P.W 16 and P.W. 2 and not the conduct of the appellant. Further more one material fact which the High Court had completely overlooked is that the appellant ceased to be in charg of the case on 5-1-1981. Thereafte the investigation of the case was taken charge of by P. W. 18 and stil later by P W. 19 Even according t D.W. 2 the report from the Forensic science Laboratory was sent t the Crime Detachment only on 7-1-198 whereas the appellant ceased to be i charge of the case on **5**-1-1981 itself It, therefore, passes one's comprehension as to how the appellant ca be accused of having wilfully suppressed material documents from th notice of the court in order to secur a conviction unjustly against the accused in the murder case. The Hig Court, it is surprising to find has no applied its mind to the series of suspicious features noticed by the sessio Judge to draw an adverse inference against P.W. 16 and D W. 2 in conducting the so-called cellophone tap test and sending the tape to the Forensic Science Laboratory for its report The learned judge has taken it fo granted that P.W. 16 had actually carri out a cellophone tape test, that in carrying out such a test he was wedded t scientific methods of investigation an that he and DW 2 had acted fairl and squarely in trying to find ou the real cause of death of Komalavl and that it was the appellant who ha an aversion to the use of scientifi methods in investigation of crimes an that the appellant had purposely concealed materials which were favourabl to the accused in order to secure conviction at any cost. The learne judge failed to see that a matter of fa

S. Natarajan.
Judge
Supreme Court of Iudia

the accused was not kept in dark regarding the cellophone tape test that was deemed to have been done but on the other hand he had full information of the test and its result, and it was on account of that he was able to summon police officials to figure as defence witnesses and police records as defence exhibits. Ws are, therefore, clearly of opinion that the High Court had completely misdirected itself in its consideration of the petitions filed by respondents 2 and 3 to seek expunction of the adverse remarks made against them by the Sessions Judge.

13. We have also to point out a grievous procedural error committed by the High Court. Even assuming for argument's sake that for expunging the remarks against respondents 2 and 3 the conduct of appellant required scrutiny and merited adverse comment, the principles of natural justice required the High Court to have issued notice to the appellant and heard him before passing adverse remarks against him if it was considered necessary. By its failure the High Court has failed to render elementary justice to the appellant.

14. Yet another serious infirmity contained in the impugned order is that the High Court has failed to bear in mind the well-settled principles of law laid down by this Court in more than one case that should govern the Courts before disparaging remarks are made against persons or authorities whose conduct comes into consideration before Courts of Law in cases arising before them for decicion. In State of U.P. v. Mohd. Naim (1964) 2 SCR 363, 374, equal to AIR 1964 SC 7o3 707 it was held as follows :

"If there is one principle of cardinal importance in the administration of justice, it is this the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this Court. At the same time it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fair play and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of disparaging making remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bering on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve."

S Natarajan
Judge
Supreme Court of India

This ratio has been followed in (1976) 1 SCR, 204 R. K. Lakshmanon v. A K Srinivasan and (1986) 2 SCC 569, Niranjan Patnaik v. Sashibhushan Kar (to which one of us was a party). Judged in the light of the above tests, it may be seen that none of the tests is satisfied in this case. It is indeed regrettable that the High Court should have lightly passed adverse remarks of a very serious nature affecting the character and professional competence and integrity of the appellant in purported desire to render justice to respondents 2 and 3 in the petition filed by them for expunction of adverse remarks made against them.

15. The appeal is, therefore, allowed and the adverse remarks against the appellant in the order of the High Court which have been extracted above will stand expunged from the order under appeal.

Appeal allowed.

t No. 44, p. 01

O. Chinnappa Reddy
Judge
Supreme Court of Iudia

OBSERVATION

election of–candidates for service Viva voce—Omission of Interview Board to vide total marks into sub-heads—Held, was not obligatory in instant case as were no specific instructions to sub-divide total marks.—Constitution of India, 15

OBSERVED BY

O. Chinnappa Reddy and E.S. Venkatramiah

Hon'ble Chief Justice and Judges Supreme Court of India.

IN

rit Petn. (Civil) No. 15767 of 1984 decided on 24-1-1986 between Dr. Ram Pal, Petitioner v. U.P. Higher Education Services Commission, bad and others, Respondents:

TEXT

innappa Reddy, J :—Dr. Keshav Pal, a Ph.D. and a D.Litt. in it, who has been teaching degree ost-graduate classes for the last rs, who has worked as Reader ead of the Department of San- rom August 1971 onwards and as further acted as Principal of jpat Rai Post-Graduate College, bad for two years in 1972-73 ain from July 3, 1984, applied U.P. Higher Education Services ission for the post of Principal onse to an advertisement invi- plications for eight such posts. s one of the 60 candidates, who nterviewed by the Commission was not selected. He has filed esent application under Art. 32 Constitution for the issue of a uestioning the selection made by the Commission on two grounds. The first ground was that the Commission was biased as he belonged to an inferior caste namely, the Gadariya (Shepherd) caste whereas the gentlemen, who constituted the interviewing Board, belonged to the higher castes of Hindu Society. He wanted us to draw the inference of bias from the circumstances, which he alleged in the petition that when he appeared before the Board and when in answer to a query, he told the Board that he belonged to the Gadariya caste, the Board appeared to lose all interest in him, though, in the beginning, they appeared to be quite impressed with him. According to the petitioners, thereafter the interview was a mere make-believe. It was later that he came to know that the gentlemen, who constituted the Board, belonged to the higher castes and that all the eight persons selected by them also belonged to the higher castes. We are afraid we are unable to draw the inference which the petitioner wants us to draw from the circumstances There were six members of the interviewing Board and it is too much to think that the Board collectively decided not to select the petitioner for the sole reason that he belonged to an inferior caste and they belonged to higher castes. There is nothing whetever to justify the allegation. The Chairman of the Commission has filed an affidavit and he has denied that any enquiry was made of the petitioner regarding his surname or caste.

2. The second ground on which the petitioner challenged the selection was that it was arbitrary. According to him, he possessed the highest academic qualifications and the longest experience and, therefore, he should have been preferred to all the others who were selected. He contended that though each of the members of the enterviewing Board was allocated 50 marks, there was no allocation of the marks for the various heads under which the merit of the candidates was judged. The argument was that although the basis of selection was said to be the candidates academic attainments, teaching experience, administrative experience and suitability for the post of Principal,’ marks were not separately allocated under reach of these heads. This procedure, according to the petitioner, arbitrary and resulted in arb selection. The learned counsel fo petitioner primaily relied on the f wing observations of Bhagwati, Ajay Hasia v. Khalid Mujib : AIR SC 487 :

“... ... The oral interview te undoubtedly not a very satisfactor for assessing and evaluating the city and calibre of candidates, b the absence of any better test for suring personal characteristics traits, the oral interview test mus the present stage, be regarded a irrational or irrelevant though subjective and based on first impres its result is influenced by many u tain factors and it is capable of a We would, however, like to point that in the matter of admissio colleges or even in the matter of p employement, the oral interview as presently held should not be r upon as an exclusive test, but it ma resorted to only as an additiona supplementary test and, moreever, care must be taken to see that per who are appointed to conduct the interview test are men of high inte calibre and qualification ”

The ovservations in Ajay Ha case (supra) have been explaine Lila Dhar v. State of Rajasthan, (19 SCC 159 : AIR 1981 SC 1777 and v has been said in Lila Dhar's (supra) has been approved by a C titution Bench of this Court, spea through Bhagwati, J. in Ashok Ku Yadav v. State of Haryana, (1

4 SCC 417. In Lila Dhar's case(supra) it was pointed out by this Court :

> "The object of any process of selection for entry into a public service is to secure the best and the most suitable person for the job, avoiding patronage and favouritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services." ...."How should the competitive examination be devised?........ ...."
>
> "It is now well recognised that while a written examination assesses a candidate's knowledge and intellectual ability, an interview test is valuable to assess a candidate's overall intellectual and personal qualities. While a written examination has certain distinct advantages over the interview test there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, co-operativeness, capacity for clear and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, a daptability, judgment, ability to make decision, ability to lead, intelleectual and moral integrity. Some of these qualities may be evaluate, perhaps with some degree of error, by an interview-test, much depending on the constitution of the Interview Board...... ......"

Thus, the written examination assesses the man's intellect and the interview-test the man himself and "the twain shall meet" for proper selection. If both written examination and interview test are to be essential features of proper selection, the question may arise as to the weight to be attached respectively to them. In the case of admission to a college, for instance, where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may have to be attached in later life greater weitght has perforce to be given to performance in the written examination. The importance to be attached to the interview-test must be minimal. That was what was decided by this Court in Periakaruppan v. State of Tamil Nadu, Ajay Hasia v. Khalid Mujib Sehravardi, and other cases. On the other hand, in the case of Services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic and professional requirments being satisfied. To subject such persons to a written examination may yield unfruitful and negative results, apart from its being an act of cruelty to those persons. There are, of course, many services to which recruitment is made from younger candidates whose personalities are on the threshold of development and who show signs of great promise, and the discerning may in an interview test, catch a glimpse of the future personality. In the case of such services, where sound selection must combine academic ability with personality promise, some weight has to be given, though not much too great a weight, to the interview-test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service according to the requirments of the service, the minimum qualifications prescribed, the age group from which the selection is to be made, the body to which the task of holding the interview-test is proposed to be entrusted and a host of other factors. It is a matter for determination by experts. It is a matter for research. It is not for Courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives........."

These observations in Lila Dhar's case were quoted verbatim in Ashok Kumar Yadav's case (supra) and approved. In Lila Dhar's case, the Court also said.:

"It is true that in Periakaruppan case (AIR 1971 SC 2303) the Court held that the non-allocation of marks under various heads in the interview-test was illegal but that was because the instructions to the Selection Committee provided that maks were to be awarded at the interview on the basis of five distinct tests. It was thought that the failure to allocate marks under each head or distinct test was an illegality. But in the case before us, the rule merely and generally indicates the criteria to be considered in the interview-test without dividing the interview-test into dsttinct, if we may so call them sub-tests......"

3. We do not think that the Interviewing Board, in the present case, was under any obligation to sub-divide the marks under various sub-heads. The writ petition is, thercfore, dismissed' but in the circumstances, without costs.

Petition dismissed.

D. P. Madon
Judge
Supreme Court of India

OBSERVATION

(A) Constitution of India, Art. 311 (2), Second Proviso, Cl (b)—Dismissal from rvice without inquiry—Cyclostyled orders passed against several persons—That does ot as a universal rule indicate non-application of mind.

(B) Constitution of India, Art. 311 (2), Second Proviso, Cl, (b)—Bombay Police ct (22 of 1951), S. 25 (1)—Dispensation of inquiry—Recording of reasons—Police onstable dismissed from service without inquiry—Reasons for dispending inquiry rved separately after order of dismissal, appearing to be recorded later—Order of smissal itself however, containing reasons for dispensation—Dispensation of inquiry as proper.

(C) Constitution of India, Art. 311 (2), Second Proviso, Cl. (b)—Bombay Police ct (22 of 1951), S. 25 (2)—Dispensation of enquiry—Head Constable in armed batch -Dismissal from service after dispensing with inquiry—Propriety.

(D) Constitution of India Art. 311 (2), Second Proviso Cl. (b)—Bombay Police ct (22 of 1951), S. 25 (1)—Disciplinary inquiry—Dispensation of—Mutiny by Police rce—Police Constable who was one of the active instigators dismissed from service ithout inquiry—Fact that he was arrested before violence broke out is irrelevant-- nquiry rightly dispensed with.

OBSERVED BY

A.P. Sen and D.P. Madon,
Hon'ble Chief Justice and Judges, Supreme Court of India.

IN

Civil Appeals Nos. 4041 of 1982 and 4363 of 1985 decided on 14-2-1986, bet-een Shivaji Atmaji Sawant, Appellant v. State of Maharashtra and others, Res-ondents.

And

Namdeo Jairam Velankar, Appellant v. State of Maharashtra and another Res-ondents.

TEXT

Madon, J. :— The Appellant in ivil Appeal No. 4041 of 1982, Shivaji tmaji Sawant, was a Police Constable the Bombay City Police Force attac-ed to the Bandra Police Station in Bombay. He was governed by the Bombay Police Act, 1951 (Bombay Act No. XXII of 1951). By an order dated August 22, 1982, passed by the Commissioner of Police Greater Bombay, he was dismissed from service, without a charge-sheet having been issued to him and without any inquiry being held with respect to the misconduct alleged against him. The said order of dismissal was passed under Section 25 (1) of Bombay Police Act read with Clause (b) of the second proviso to Article 311 (2) of the Constitution of India. The writ petition filed by sawant challenging the said order of dismissal was dismissed by the Bombay High Court. He has thereupon approached this Court in appeal by way of Special Leave granted by this Court.

2. The Appellant in Civil Appeal No. 4363 of 1985, Namdeo Jairam Velanker, was a Head Constable in Armed Batch No. 645 and was posted at Aurangabad. He too was governed by the Bombay Police Act. He was also dismissed in the same way as Sawant by an order dated August, 22 1982, passed by the Superintendent of Police, Aurangabad, under Section 25 (2) of the Bombay Police Act read with Clause (b) of the second proviso to Article 311 (2) of the Constitution. He had also filed a writ petition before the Aurangabad Bench of the Bombay High Court which was dismissed and he too has approached this Court in appeal by way of Special Leave granted by this Court.

3. Section 25 of the Bombay Police Act specifies the officers who are entitled to punish the members of the Bombay Police Force. Under Clause (b) of the second proviso to Article 311 (2) of the Constitution, an authority empowered to dismiss or remove a civil servant or reduce him in rank is authorised to dispense with the inquiry provided in Clause (2) of Article 311, if it is satisfied that for some reason to be recorded by it is not reasonably practicable to hold such inquiry. In the case of Union of India v. Tulsiram Patel and other connected matters, (1985) 3 SCC 398 a Constitution Bench of this Court has considered in great detail the scope and effect of Articles 309, 310 and 311 of the Constitution and particularly of the second proviso to Article 311 (2). The conclusions reached by this Court in Tulsiram Patel's case have been summarized in Satyavir Singh v. Union o India, (1985) 4 SCC 252 : AIR 1986 SC 555). In view of this decision the only contention raised before us at the hearing of these Appeals was that the impugned orders of dismissal suffered from a total non-application of mind. The facts on the record, however, completly belie this contention and we will now proceed to narrate them.

4 Article 33 of the Constitution empowers Parliament by law to determine to what extent any of the rights conferred by Part III of the Constitution (that is, the Fundamental Rights) shall in their application inter alia to the Forces charges with the maintenance of public order be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them. In pursuance of this power Parliament has enacted the Police Forces (Restriction o Rights) Act, 1966 (Act No. 33 of 1966)

s shown by the Statement of Objects id Reasons and the long title of the ct, the object of the Act is to provide r the restriction of certain Fundamen- l Rights in their application to the embers of the Forces charged with the aintenance of public order so as to isure the proper discharge of their ities and the maintenanc of disci- ine among them. Under Section 1(3) ie said Act is to come into force i such date as may be appointed in is behalf by notification in the Offi- al Gazette, in a Union Territory by e Central Government and in a State, / the Government of that State. It was ought into force in the State of Maha- shtra with effect from July 15, 1978, by otification No. PPF 0229-PLO-III ated July 10, 1979, published in the Iaharashtra Government Gazette dated ıly 26, 1979, Part IVA at page 502. ause (a) of Section 2 of the said Act efines the expression "member of a po- ce-force" as meaning" any person ppointed or enrolled under any enact- ient specified in the Schedule". Among ie enactments so specified is the Bom- ay Police Act, 1951 Under Section 3 of ie said Act of 1966, no member of a olice Force is, without the express san- tion of the Central Government or of ie prescribed authority, to be a member f, or be associated in any way with, ny trade union, labour union, political ssociation, or with any class of trade nions, labour unions or political asso- iations, or be a member of, or e associated in any way with any ther society, institution, associ- tion or organization that is not recognized as part of the Force of which he is a member or is not of a purely social, recreational or religious nature. Further, a mamber of a Police Force is prohibited from participating in or addressing any meeting or taking part in any demonstration organized by any body of persons for any political purposes or for such other purposes as may be prescribed by rules made under the said Act. Rule 3 of the Police Forces (Restriction of Rights) Rules, 1966, provides as follows :

3. Additional purposes, for which a member of a police-force not to participate in, or address any meeting, etc.

No member of a police-force shall participate in, or address any meeting or take part in any demonstration organised by any body of persons —

(a) for the purpose of protesting against any of the provisions of the Act or these rules or any other rules made under the Act; or

(b) for the purpose of protesting against any disciplinary action taken or proposed to be taken against him or against any other member or members of a police-force; or

(c) for any purpose connected with any matter pertaining to his remuneration or other conditions of service or his conditions of work or his living conditions or the remuneration, other conditions of service, conditions of work or living conditions, of any other member or members of a police force;

Provided that nothing contained in Clause (b) shall preclude a member of a police-force from participating in a meeting convened by an association of which he is a member and which has been accorded sanction under sub-section (1) of Section 3 of the Act, where such meeting is in pursuance of, or for the furtherance of the object of such association."

Uunder Section 4, any person who contravenes the provisions of Section 3 commits an offence and is liable, without prejudice to any other action that may be taken against him, to be punished with imprisonment for a term which may extend to two years or with fine which may extend to Rs. 2000 or with both.

5. With a view to give members of the Bombay Police Force an opportunity to ventilate their grievances with respect to service conditions and allied matters the Government of Maharashtra announced that it would permit the members of the Force to form associations at the State level as well as Unit level. The authority to grant recognition to such associations was Inspector General of Police, Maharashtra State. Before any recognition was given, associations were formed and office-bearers elected. The associations at the State level was the Maharashtra Police Karamchari Sanghtana and at the Greater Bombay level was the Maharashtra Police Karamchari Sanghtana, Greater Bombay; The Inspector-General of Police granted recognition to these associations by his order dated March 20, 1982, on conditions (1) that the members should not resort to strike or withhold their services or otherwise delay the performance of their duties in any manner, (2) that the Association should not resort to any coercive method of agitation for obtaining redressal or grievances, and (3) that the Association should not do anything which may affect the efficiency of the Force or undermine its discipline.

6. Sawant is alleged to have taken the lead along with one S.D. Mohite in forming the Greater Bombay Association and starting its activities. It is further alleged that from the inception of the activities of this Association, the principal office-bearers and leaders started spreading an atmosphere of indiscipline culminating in the members of the Police Force, including Sawant, wearing black bands and badges on the Independence Day of 1982, namely, August 15, 1982. Consequently the State Government suspended the recognition of the said Association for a period of three months. This resulted in Bomby in a strike of the police constabulary and widespread rioting, arson, looting and other acts amounting to mutiny from August 11, 1982. The situation became so serious that on the very day of the outbreak of those incidents, namely, August 18, 1982, military and para-military forces had to be summoned to deal with the members of the Police Force who had rioted and mutinied and even then it took some days for normalcy to be restored. The events which

ook place on and from August 18, 982, are not disputed. In fact, in his Petition for Special Leave to Appeal Sawant has himself described them as "deplorable incidents".

7. Three contentions were urged on behalf of Sawant in order to substantiate the contentions that the impugned order of dismissal passed against him was without any application of mind. The first contention was that Sawant was arrested in the early hours of August 18, 1982, and, therefore, did not and could not have taken part in the incidents of violence, arson, looting and mutiny which took place on and from that date. Assuming it is so, Sawant is alleged to have been one of the active instigators, and leaders who were responsible for the creation of such a serious situation which rendered all normal functioning of the Police Force and normal life in the city of Bombay impossible. As pointed out by this Court in Satyavir Singh v. Union of India (1985 (4) SCC 252) it is not necessary that the disciplinary authority should wait until incidents take place in which physical injury is caused to others before taking action under clause (d) of the second proviso to Article 311 (2). A person who incites others to commit violence is as guilty, if not more so, than the one who indulges in violence, for the one who indulges in violence may not have done so without the instigation of the other. The second contention was that identical orders were passed against forty-three other members of the constabulary and that all these orders, including the one served upon Sawant, were cyclostyled. Where several cyclostyled orders are passed, It would prima facie show non-application of mind but this is not a universal rule and would depend upon the facts and circumstances of each case. In Tulsiram Patel's case, (1985) (3) SCC 398 cyclostyled orders were served upon several members of the Unit of the Central Industrial Security Force posted at Bakaro with the names of the individual member filled in rejecting a similar contention raised in that case, this Court observed.

"It was said that the impugned orders did not set out the particular acts done by each of the members of the CIS Force in respect of whom dismissal order was made, and these were merely cyclostyled order with the names of individual members of the CIS Force filled in. Here was a case very much like a case under Section 149 of the Indian Penal Code. The acts alleged were not of any particular acting by himself. These were acts of a large group acting collectively with the common object of coercing those in charge of the administration of the CIS Force and the Government in order to obtain recognition for their association and to concede their demands. It is not possible in a situation such as this to particularize the acts of each individual member who participated in the commission of these acts. The participation of each individual may be of greater or lesser degree but the acts of each individual contributed to the creation of a situation in which a security force itself become a security risk."

The third contention was that the reasons for dispensing with the inquiry did not accompany the order. In Tulsiram Patel's case this Court held that the recording of the reason for dispensing with the inquiry is a condition precedent to the application of Clause (b) of the second proviso and if such reasons are not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional. The Court also held that though it was not necessary that the reasons should find a place in the final order imposing penalty, it would be advisable to record them in the final order so as to avoid an allegation that the reasoes were not recorded in writing before passing the final order but were subsequently fabricated. What had happened in Sawant's case was that either along with the order or soon thereafter, reasons in writing for dispensing with the inquiry were served upon Sawant. A perusal of the reasons shows that they were recorded later. Were the impugned order of dismissal one which merely imposed a penalty, it would have been bad and would require to be struck down in view of the decisions in Tulsiram Patel' s case. The position is however, different. The impugned order of dismissal itself sets out the reasons why it was not reasonably practicable to hold the inquiry. It is stated in the said order that some members of the Bombay City Police Force including Sawant had been instigating others to indulge in acts of insubordination and indiscipline and were instigating them to withdraw from their lawful duties, inciting them to violence and mutiny, joining rioting mobs and participating in arson, looting and other criminal acts and were wilfully disobeying orders of their superior officers and that these acts had created a situation whereby the normal functioning of the Force in Bombay had been rendered difficult and impossible, and that in view of these facts and circumstances, any attempt to hold a departmental inquiry by serving a written charge-sheet and following the procedure laid down in the Bombay Police (Punishments and Appeals) Rules, 1956, would be frustrated by the collective action of those persons and it was; there fore, not practicable to hold such an inquiry. The "reasons" served separtely merely amplified and elaborated what had been stated in the impugned order. There is thus no substance in any of the contentions advanced in the case of Sawant and it must be held that Clause (b) of the second proviso to Article 311 (2) was rightly applied in his case.

8. We now turn to the case of Velankar. He was the President of the Aurangabad Branch of the said Association. He was dimissed along with four other members of the Force posted at Aurangabad. The order of dismissal in his case sets out in detail the acts of misconduct alleged against him, the situation which was prevailing in Auran-

abad and the reasons why it was not easonably practicable to hold a discipli- ary inquiry against him. Briefly summ- rized, when the violence broke out in ombay on Auugst 18, 1982, a similar tuation was attempted to be brought bout in Aurangabad by Velankar and e four others who were dismissed long with him. Velankar is said to have d a procession on August 21, 1982, hich procession shouted provocative ogans, demanding the release of those olicemen in Bombay who had been rested and demanding their reinstate- ent and revocation of orders of sus- ension passed against others in Bom- ay Apart from these acts being in ontravention of Clause (b) of Rule 3 f the Police Forees (Restriction of ights) Rules, 1966, swift action was ecessary were the history of Bombay ot to be repeated in Aurangabad. he authorities could not be expected wait until houses and shops in Au- ngabad were looted and set on fire efore taking steps to put down the reatened insurrection In these circ- mstances, it cannot be said that in e case of Velankar, Clause (b) of e second proviso to Article 311 (2) as wrongly applied.

9. It is contended that both these ppellants are innocent of the misco- duct charged against them. If so they e not without any remedy. Under ction 27 of the Bombay Police Act, 951, an appeal lies against an order f penalty imposed upon a member f the Police Force of such officer as e State Government may specify by general or special order. The appellate authorities have been specified in Schedule II to the Bombay Police (Punishments and Appeals) Rules, 1956. Under Rule 11, an appeal is to be filed within two months of the date on which the Appellant was informed of the order, appeals against. The said Rule 11 confers upon the appellate authority, for good reasons shown, to extend the term for filing the appeal by six months. Rule 17 confers revisional jurisdiction upon the Inspector-General of Police. Under sub-rule (1) of Rule 17, the Inspector-General of Police may, of has own motion or otherwise, call for an examine the record of any case in which an order, whether an original order or an order in appeal, inflicting any punishment has been made by any authority subordinate to him in the exercise of any power conferred on such authority by the said Rules and in which an appeal lies to him him or an authority subordinate to him but such appeal has not been made in accordance with provisions of the said Rules or if such appeal has been made, after the appeal is decided by the appellate authority. Under sub-rule (2) of Rule 17, an application for revision is to be made within two months of the date on which the applicant was informed of the order complained. The Inspector-General is, however, given the power, for good cause shown to relax that period.

10. Assuming for the sake of argument that Sawant and Velankar were not guilty of the charges levelled

against them, they have a departmental remedy provided by the said Rules. The period for filing an appeal has, however, expired and even the time for extending that period has also expired. The Appellants can, however, approach the Inspector-General of Police in revision and the ends of justice would be met if we direct the Inspector-General of Police to entertain such applications for revision by relaxing the period of limitation and hearing such applications on the merits.

11. We may also mention that by a Circular No. PSA 0283/POL-5A dates July 5, 1984, the Government of Maharashtra, on humanitarian grounds as a part of the rehabilitation programme of police personnel dismissed from service or whose services were terminated in the wake of the police agitation which took place in August 1982, has decided that they would be considered for absorption in security jobs such as watchmen etc. under the Maharashtra State Electricity Board, Maharashtra State Road Transport Corporation, Maharashtra, Agro-Industries Development Corporation, Agricultural Universities, Research Stations State warehousing Corporation, etc. and that whereever, the age limit would be relaxed in respect of thes ex-policemen for making their appointments which would be treated as fres appointments.

12. In the result, we dismis both these Appeal, but direct that i case either of these two Appellants fil an application for revision to th Inspector-General of police, Maharashtra State, by April 15, 1986, the Inspector-General of Police shall condon the delay and hear and dispose of th said application on the merits. Th Appellant in each of these Appeals ma also either without filing any application for revision or after such applicatio fails apply to take advantage of th said Circular No. PSA 0283/POL-5A dated July 5, 1984, issued by th Government of Maharashtra. Al interim orders if any, in these tw Appeals will stand stand vacated.

13. The paries will bear and pa their own costs of these two appeals.

Appeals dismissed

port No. 53, p. 01

E. S. Venkatramiah
Judge
Supreme Court of India

OBSERVATION

Administrative order—Validity—Granting exemption in favour of Govt. Com- ies and Co-operative Societies—Classification is reasonale—Power not arbitrary has to be exercised in public interest. O. P. Nos. 6, 7, 1005, 1153, 1154 and 1345 1981, D/- 15-4-1981, (Ker) Reversed. (Constitution of India, Art. 14) Kerala Forest oduce (Fixation of Selling Price) Act (29 of 1978), S. 6

OBSERVED BY

E. S. Venkataramiah and
M. P. Thakkar,
Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 1871-76 of 1981 decided on 16-4-1986 between Hindustan per Corporation Ltd, Appellant v. Government of Kerala and others, Respon- nts.

TEXT

Venkataramiah, J. :—In these appe- by special leave we are concerned h the question of constitutional vali- y of Section 6 of the Kerala Forest oduce (Fixation of Selling Price) Act, 78 (Act 29 of 1978) (hereinafter refer- l to as 'the Act').

2. The appellant Hindustan Paper rporation Ltd. is a company owned the Central Government carrying on business of manufacturing newsprint its factory in the State of Kerala. fore its factory was established an reement was entered into between the pellant Hindustan Paper Corporation d. and the Government of Kerala October 7, 1974 under which the overnment of Kerala agreed to grant to the appellant the right of free use of water from the Muvattupuzha river for the purpose of manufacturing newsprint and also to make available annually to the appellant 1,50,000 tonnes of eucalyptus wood. The Government of Kerala further agreed to keep reserved from the date of agreement the State Plantations of eucalyptus grandis in Pamba, Kottayam, Punalur, Thenmalai and Trivandrum Forest Divisions as constituted then for the appellant and not to permit harvesting of eucalyptus wood and reeds by other parties and for the regeneration of the forest in the areas, the Chief Conservator of Forests, Kerala State was required in consultation with the appellant to prepare and implement a

scientific management plan which would include fire-protection and epidemic control programmes The appellant agreed to pay to the Government of Kerala royalty for the raw materials supplied to the appellant at the rate of Rs. 11/- per tonne of green wood of eucalyptus grandis and eucalyptus tereticornis (both with 50 per cent moisture) and at the rate of Rs. 12/- per tonne of green reeds with 50 per cent moisture. There were several other conditions. In the agreement with which we are not concerned in these cases. After the above agreement was entered into the appellant established its factory. The Punalur Paper Mills Ltd. and the Gwalior Rayong Silk Manufacturing (Wvg.) Co. Ltd. which were companies in the private sector had also established their factories in the State of Kerala which consumed forest produce as raw material. The Kerala State Bomboo Corporation Limited and the Travancore plywood Industries Limited which were owned by the Government of Kerala were also carrying on business in the State of Kerala.

3. In the year 1978 the Act was passed by the Kerala Legislature with the object of providing for the procedure to be followed in fixing the selling prices of certain important forest produce, for the prohibition of the sale of such forest produce at less than the prices so fixed and for matters incidental or ancillary thereto. The Act was also intended to provide for the proper regeneration and maintenance of the forests in the State. The Act governs only those forests
which are considered as reserved fores
within the meaning of Kerala Fores
Act, 1961 and forests vested in the Go
vernment under Section 3 of the Keral
Private Forests (Vesting and Assign
ment) Act, 1971. It provides for th
determination of the selling price c
certain forest produce specified in Cla
use (o) of Section of the Act. Sectio
3 of the Act requires the Governmer
to notify in the Gazette before the en
of each financial year the selling pric
of every forest produce for the follow
ing financial year. The notified pric
has to be fixed by the Government afte
taking into consideration recommend
ation of the Expert Committee consistin
of the officers mentioned in Section 4(2
of the Act. Sub-Section (3) of Section
of the Act requires the Expert Committe
to make its recommendation having reg
ard inter alia to the market price of th
forest produce, the cost of regeneratin
and maintaining the forest porduce i
cases where regeneration is necessar
after selling the forest produce; and suc
other matters as may be prescribed
Section 5 is crucial section in th
Act. It reads as followos :

"5. Forest produce to be sold a
price not less than the selling price

(1) After the date of the publica
tion of the notification under sub-sec
tion (2) of Section 3 no forest produc
shall be sold by the Government or an
forest officer at a price which is less
than the selling price of that forest pro-
duce.

(2) The sale of any forest produc
in contravention of sub section (i) shal

e null and void and shall not be enfor-
eable in a Court of law."

4. There is no prohibition of sale
f forest produce at prices higher than
ne prices mentioned in the notification
ection 7 of the Act provides that 10
ercent of the amount obtained by the
ale of forest produce after the comme-
cement of the Act, subject to such
ules as may be made under the Act,
hould be set apart for being utilsed for
ne development of forest. Section 8
nables the Government to make rules
or the purpose of carrying into effect
ne provisions of the Act. We are conc-
rned in these cases with the validity of
ection 6 of the Act which reads thus :

"6. Exemption—The Government
nay, in the public interest, by notifica-
on in the Gazette, exempt the sale of
ny forest produce—

(a) to any company owned by the
Central Government of the Government
f Kerala ;

(b) not exceeding ten cubic met-
rs, to any co-operative society registe-
ed or deemed to be registered under
he Kerala Co-operative Societies Act,
969 (21 of 1969)

from the provisions of Section 5,
ubject to such conditions and restric-
ions as may be specified in the noti-
ication."

5. The Act came into force on its
ublication, i e. on September 26, 1978.
On March 9, 1979 the Government of
Kerala published a notification exemp-
ing the appellant, i. e. Hindustan Paper
Corporation Ltd., the Kerala State Bomboo Corporation Limited and the Tranvancore Plywood Industries Limited from the provisioncs of Section 5 of the Act. The relevant part of the Notification and the Explanatory Note attached to it are given below :

"No. G.O. (MS) 100/79/AD dated, Trivandrum 9th March, 1979

S. R.O. No. 313/79 :—In exercise of the powers conferred by Section 6 of the Kerala Forest Produce (Fixation of Selling Price) Act, 1978 (29 of 1978), the Government of Kerala, being satisfied that it is necessary so to do in the publie interest, hereby exempt the sale of any forest produce to the Kerala Newsprint Project under the Hindustan Paper Corporation. The Kerala State Bamboo Corporation and the Travancore Plywood Industries, Punalur from the provisions of Section 5 of the said Act.

By order of the Governor

K. V. Vidhyadharan

Additional Secretary to Govt.

Explanatory Note

After Government have notified selling price of Forest Produce under Section 3 of Act 29 of 1978. Forest Produce cannot be sold at prices less than the selling price. Under Section 6 of the Act, Government can exempt in public interest, by Notification, the sale of any Forest Produce to companies owned by the Central Government, by Government of Kerala. As Kerala Newsprint Project, Bamboo Corporation and the Travancore Plywood Industries, Punalur are undertakings of the Central Government and the Government of Kerala respectively, it is considered expedient to exempt these from the provisions of Section 5 of the Act. The Notification is intended to achieve the above purpose."

6 The State Government issued the Notification under Section 3 of the Act fixing the price below which forest produce covered by the Act could not be sold. Aggrieved by the Notification granting exemption to the Government companies, the two companies in the private sector, namely, Punalur Paper Mills Limited and the Gwalior Rayong Silk Manufacturing (Wvg) Co. Ltd. filed writ petitions in the High Court questioning the constitutional validity of Section 6 and the Notification granting exemption thereunder in favour of the appellant Hindustan Paper Corporation Ltd. and two other companies owned by the Government of Kerala. The writ petitions were opposed by the Government of Kerala, the appellant Hindustan Paper Corporation Ltd, the Kerala State Bamboo Corporation Ltd. and the Travancore Plywood Industries Ltd. In the counter-affidavit filed on behalf of the Government of Kerala the contentions urged by the petitioners in the writ petitions were refuted and the State Government took the stand that Section 6 of the Act was constitutionally vallid. At the hearing of the writ petitions before the High Court, the Additional Advocate General who appeared for the State Government conceded that in his opinion Section 6 of the Act was unconstitutional. Perhaps what he meant was that he was not able to offer any good answer to the contentions urged by the other side in support of the challenge to the constitutionality of the concerned provision. A reference to this concession which was neither here nor there is found at the end of paragraph 22 of the judgment of the High Court. The High Court held that S. of the Act was violative of Art. 14 of the Constitution ann struck is down along with the Notification. No appeal was filed by the State Govt. The above appeals are filed by the Hindustan Paper Corporation Ltd. the appellant herein which is one of the beneficiaries of the Notification granting exemption. But, at the hearing of these appeals in this Court the learned counsel for the Government of Kerala stated that the concession made by the learned counsel for the State before the High Court was incorrect, and supported the validity of Section 6 of the Act and the Notification granting exemption issued thereunder-

7. These appeals are filed against the judgment of High Court after obtaining the leave of this Court under Article 136 of the Constitution, Section 6 of the Act has already been set out above. It confers the power on the State Government to grant exemptions from the provisions of Section 5 of the Act. The power conferred under Section 6 of the Act is not unfettered The Government can grant the exemption only in the public interest. Such exemption can be granted only to a company owned by the

entral Government or the Governnent of Kerala. There is also, howeer, a provision in Clause (b) of Section of the Act, which ununderstandably as also been struck down by the High ourt, even though its validity had not een expressly challenged. Under his provison any sale of forest roduce not exceeeding ten cubic eters effected in favour of any o-operative society registered or eemed to be registered under the erala Co-operative Societies Act, 979 may be exempted from Section 3 f Act by the State Government. While ssuing the notification granting xemption it is open to the State Govenmenut to impose appropriate condit ons and restrictions. The State Govenment, of course, has to bear in mind he entire policy and object of the Act efore exercising its power under Secton 6 of the Act. At the outset it shold be observed that the decision of the igh Court to the extent it has quashd Clause. (b) Section 6 of the Act hich gave power to the State Governent to exempt the sale of any forest roduce in small quantities not exceedng 10 cubic meters to any co-operative ociety is liable to be set aside straight ay without anything more as there was o challenge to that part of the section t all and the High Court has not at all crutinized the constitutionl valtdity f this provision.

8. The reasons given by the High ourt for quashing Section 6 of the Act re these :

(1) if the Government is given a power to sell the produce at a lower price than the notified rate to the Government companies it will enable the Government to cripple or in slow degrees to eliminate the other consumers in the field. This conferment of power on the State Government is discriminatory and unreasonable.

(2) a Government company is as such a legal entity as any other entity. It is a commercial corporation acting on its own behalf and all consumers of the forest produce should have an equal opportunity to get the goods. The Government company could not, therefore, be given any favuor.

(3) there is no nexus between the object to be achieved by the Act and the exemption to be granted, in favour of the Government companies, and

(4) the submission made by the Additional Advocate General to the effect that he could not support the validity of Section 6 of the Act.

9. We find it difficult to accept the grounds on which the High Court has held Section 6 of the Act to be unconstitutional. So far as consumers of forest produce who are not granted any exemption under Section 6 of the Act are concerned, any sale of forest produce in their favour cannot be effected at a price less than the price notified under Section 3 of the Act. The notified price has to be fixed on the basis of the recommendation to be made by the Expert Committee constituted under Section 4 of the Act and the Expert Committee is required to take into

consideration the market price of the forest produce, the cost of regenerating and maintaining the forest produce in cases where regeneration is necessary after selling the forest produce and such other matters as may be prescribed. If Section 5 of the Act provides that the forest produce coverd by the Act shall not be sold at a price less than the price which is determined on the basis of the factors referred to above which appear to be quite relevant they cannot have any grievance. They cannot claim that they must be shown any concession and that the forest produce should be made available to them at a price which would be lower than the market price. Even when it is stated that any company owned by the Central Government or the Government of Kerala or a co-operative society (subject to the limit regards the quantity of forest produce without the constraint contained in Section 5 of the Act, it does not mean that the forest produce would be made available to them at throw-away prices. It is reasonable to expect that the price payable for the forest produce in question by the Government companies or co-operative societies would be determined after negotiations having regard to the public interest. In almost all the statutes by which the fiscal or economic interests of the State are regulated, provision for granting exemption in appropriate cases would have necessarily to be there and the power to grant exemption is invariably conferred on the Government concerned. The Legislature which is burdened with heavy legislative and other types of work not able to find time to consider in deta the hardships and difficulties that ar likely to result by the enforcement the statute concerned. It has, therefor now become a well-recognised and c stitutionally accepted legislative pra tice to incorporote provisions conferri the powers of exemption of the Gove ment in such statutes. Such exemptio cannot ordinarily be granted secretl A notification would have to be issu and published in the Gazette and in t ordinary course it would be subject t the scrutiny by the Legislature. T power can be exercised only in the pu lic interest as provided by the sectio itself. The validity of provisions co ferrig the power of exemption has bee cosistently upheld by this Court in number of decisions commencing wit the State of Bombay v. F.N. Balsar 1951 SCR 682 : (AIR 1951 SC 318 The next question is whether Section of the Act which restricts the power c the Government to grant exemption t companies owned by the Central Gover nment or the Government of Keral and to co-operative societies only i valid. As far as Government under takings and companies are concerned it has to be held that they form a clas by themselves since any profit that ma make would in the end result in th benefit to the members of the genera public. The profit, if any, enriches th public officer and not the private offe The role of industries in the public sec tor is very sensitive and critical fron the point of view of national economy

Their survival very often depend upon the budgetary provision and not upon private resources which are available to the industries in the private sector. They are often established to break the power of strangulation on economy which the industries in private sector may have developed and may be using to choke the industrial growth of the country. An exemption or a concession might provide them some breathing time or settling down tine. It may be treated as a subsidy at the worst. This appears to be the policy behind Article 19 (6) (ii) of the constitution. In appropriate cases in order to place an industry owned by the Government on an enduring basis in the nationl interest some concession may have to be shown to it. It is neither alleged nor establihed that if the exemption is annulled the petitoners will be richer by a single paisa or if it is retained they will be poorer by a single paisa. The only purpose hinted at is that if the public sector is made to pay more, it may use less raw material which in turn might be available to the private sector. Not a very laudable pnrpose to say the least of it. The action of the State Government in exempting the Government companies from the operation of Section 5 of the Act does not in the instant case amount to the exclusion of the industries in the private sector from their business nor does it deny the usual supplies of forest produce used as raw-material by these industries as alleged by them. The Government is not shown to be taking any undue advantage of the monopoly it enjoys as the owner of the forest and the position it holds as the sole supplier or forest produce in fixing the minimum prices in order to preserve the national wealth from being wasted away. In the circumstances of this case it cannot be said that the provision is either arbitrary or unreasonable even though the Government industries may be rivals in trade to the industries in the private sector. In Sher Singh v. Union of India (1984) 1 SCR 464 this Court has upheld Section 47 (1H) of the Motor Vehicles Act, 1939 under which a statutory preference is shown to a State Transport Undertaking. In Viklad Coal Merchant Patiala v. Union of India (1984) 1 SCR 657 the preference shown to the Government in allotment of railway wagons for transporting coal has been upheld. Learned counsel for the respondents however depended upon the decision of this Court in State of Rajasthan v. Mukanchand (1964) S SCR 903 by which an exemption granted in respect of debts due to the State or a scheduled bank from the operation of Section 2 (e) of the Jagirdar's Debt Reducation Act, 1937 was held to be not in conformity with the object of the Act and so violative of Article 14 of the Constitution. That case depended on the facts and circumstances surrounding the statute in question. We may refer here to the decision of this Court in Fatehehand Himmatlal v. State of Maharashtra (1977) 2 SCR 828. Where it is observed at page 849

"There is no merit in the plea-

Liabilites due to government to local authorities are not tainted with exploitation of the debtor. Likewise debts due to banking companies do not ordinarily suffer from overreaching, unscrupulousness or harsh treatment. Moreover, financial institution have until recently, treated the village and urban worker and petty farmer as untouchables and so do not figure in the picture. To exempt the categories above referred to is reasonable."

10. Hence, preference shown to Government companies under Section 6 of the Act cannot be considered to be discriminatory as they stand in a different Class altogether and the classification made between Government companies and others for the purposes of the Act is a valid one. Same is the case with the clause which gives power under Section 6 of the Act to the Government to exempt sales of forest produce in favour of cooperative societies up to the limit mentioned therein. In P. V. Sivaranjan v Union of India (1959) Suppl (1) SCR 779: the exemption granted in favour of traders carrying on export business in a small scale who formed cooperative societies was upheld. In Orient Weaving Mills (P) Ltd. v. Union of India (1962) Suppl (3) SCR 481 this Court upheld the exemption granted in favour of powerloom weavers in a co-operative society from the levy of central excise duties. We do not find any substance in the contention that the provision granted exemption in favour ef Government companies and the co-operative societies as stated above is uncontitutional. w must, however, express our disappro val of one of the reasons given by th High Court for striking down Sectio 6 of the Act, namely. "private secto consumers generally show more con cern in the speedy production of goods in the finished products and in the sal of them which is in public interest a well" The above observation is no warranted and is presumably based o the personal opinion of the learne judges. It is misleading and conno in the circumstances of the case serve a a prop to support the contention of th respondents.

11. Therefore, the decision of th High Court that Section 6 of the Ac was violative of Article 14 of the Cons titution is liable to be set aside. We d not also approve of the finding of th High Court that even assuming that th section was valid, the notificatio issued thereunder was invalid. It ma be stated here that the Writ petitioner on whom the burden lay have not give any valid reason as to why we shoul hold that the impugned notificatio was not in the public interest. As mentioned earlier the appellant, Hindustan Paper Corporation Ltd. established its factory after entering into an agreement with the State Government as re gards the regular supply of raw-material from the forests in the State o Kerala for production of newsprint and that the said factory was employing a large labour force. The other two concerns in whose favour the exemption is granted by the impugned notification

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are the concerns of Kerala Government tself. We have no material in this ase to hold that the impugned notification was not in the public interest. We accordingly set aside the finding recorded by the High Court on the validity of the notification also.

E. S. Venkataramiah
Judge
Supreme Court of India

12. In the result, we allow the appeals, set aside the judgment of the High Court and dismiss the writ petitions filed in the High Court. There shall, however, be no order as to costs.

Appeals allowed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

D. P. Madon
Judge
Supreme Court of India

OBSERVATION

(A) Constitution of India, Art. 12—Expression, 'the State' in Art 12—Interpretation of—Definition of expression 'the State' in Art 12 being for purposes of Part III and part IV expression is not confined to its ordinary and constituional sense as extended by inclusive portion of Art 12 but used in the concept of the State in relation to Fundamental Rights guaranteed by Part III and Directive Principles of State Policy contained in Part IV which are declared by Art 37 to be fundamental to governance of the Country (Interpretation of Statutes—Inclusive definition).

(B) Constitution of India, Art 12—"The State"—Central Inland Water Transport Corporation Ltd.—Though Govt. Company under S. 617 of Companies Act is "the State" within meaning of Art 12 (Companies Act (1956), S. 617)

(C) Constitution of India, Arts 14, 39 (a), 41 and 226—Central Inland Water Transport (Corporation Ltd Service Discipline and Appeal Rules (1979), R 9 (i)—R. 9 (B) empowering Corporation to terminate services of permanent employees without giving any reason and by giving notice—It is void under S. 23 of Contract Act as being opposed to public policy—It is also ultra vires Art. 14 of Constitution and also violative of Directive Principles contained in Arts. 39 (a) and 41—However, right to resign is not void. (Contract Act (9 of 1982), S. 23). 1986 Lab IC 494 (Cal), partly Reversed.

(D) Contract Act (9 of 1982), S. 23—Expression 'Opposed to Public Policy'—Not defined in Contract Act—Scope of transactions falling thereunder varies from time to time.

(E) Constitution of India, Arts 14, 226—It is not only cases to which Art. 14 applies that rules of natural justice come into play.

(Para 99)

(F) Central Inland Water Transport Corporation Ltd Service Discipline and Appeal Rules (1979), Rr. 1, 9 (i)—Applicability—Officers of Rivers Steam Navigation Company Ltd whose services were taken over by Corporation under Scheme of Arrangement sanctioned by Calcutta High Court—Employees employed mainly in managerial capacity—No Separate orders issued by Board of Directors in their case—They are governed by Rules.

(Para 71)

OBSERVED BY

A. P. Sen and D. P. Madon

IN

Civil Appeals Nos. 4412 and 4413 of 1985, decided on 6-4-1986 between Central Inland Water Transport v. Brojo Nath Ganguly and another, Respondents.

and

D. P. Madon
Judge
Supreme Court of Indi

Central Inland Water Transport Corporation Ltd. and another, Appellants
Tarun Kanti Sengupta and another, Respondents.

TEXT

Madon J. - These Appeals by Special Leave granted by this Court raise two questions of considerable importance to Government companies and their employees including their officers. These questions are :

(1) Whether a Government company as defined in S. 617 of the Companies Act, 1956, is "the State" within the meaning of Art. 12 of the Constitution ?

(2) Whether an unconscionable term in a contract of employment is void under S. 23 of the Indian Contract Act, 1872, as being opposed to public policy and, when such a term is contained in contract of employment entered into with a Government company, is also void as infringing Art 14 of the Constitution in case a Government company is "the State" under Art. 12 of the Constitution ?

2. Although the record of these Appeals is voluminous, the salient facts lie within a narrow compass. The First Appellant in both these Appeals, namely the Central Inland Water Transport Corporation Limited (hereinafter referred to in short as "the Corporation"), was incorporated on February 22, 1967. The majority of the shares of the Corporation were at all times and still are held by the Union of India which is the Second Respondent in these Appeals, and the remaining shares were and are
held by the State of West Bengal an
the State of Assam, Section 617 of th
Companies Act, 1956 (Act No. 1 c
1956) provides as follows :

"617. Definition of 'Governmen
Company'.—

For the purposes of this Act Gover
nment Company means any compan
in which not less than fifty-one per cen
of the paid-up share capital is held b
the Central Government, or by an
State Government or Governments, c
partly by the Central Government an
partly by one or more State Govern
ments and includes a company which
a subsidiary of a Government compan
as thus defined." As all the shares c
the Corporation are held by differen
Governments, namely, the Governmen
of India and the Governments of We
Bengal and Assam, the Corporation
not only a Government company as def
ned by the said S. 617 but is a compan
wholly owned by the Central Govern
ment and two State Governments.

3. Clause III(A) of the Memoran
dum of Association of the Corporatio
lists the main objects of the Corpora
tion and clause III(B) of the Memoran
dum of Association lists the objec
incidental or ancillary to the main obj
cts. It is unnecessary to reproduce a
these objects for according to the Pet
tions filed by the Corporation for obtai

ing Special Leave in these Appeals, it is currently engaged in carrying out the following activities, namely,

(i) maintaining and running river service with ancillary function of maintenance and operation of river-site jetty and terminal;

(ii) constructing vessels of various sizes and descriptions;

(iiii) repairing vessels of various sizes and descriptions; and

(iv) undertaking general engineering activities.

4 Article. 4 of the Articles of Association of the Corporation provides that the Corporation is a private company within the meaning of Clause (iii) of sub-section (1) of S. 3 of the Companies Act and that no invitation is to be issued to the public to subscribe for any shares in, or debentures or debenture stock of, the Corporation. Article 51 of the Articles of Association confers upon the President of India the power to issue from time to time such directions or instructions as he may consider necessary in regard to the affairs or the conduct of the business of the Corporation or of the Directors thereof. The said Article also confers upon the President the power to issue such directions or instructions to the Corporation as to the exercise and performance of its functions in matters involving national security or public interest. Under the said Article, the Directors of the Corporation are bound to comply with and give immediate effect to such directions and instructions. Under Art. 51A, the President has the power to call for such returns, accounts and other information with respect to properties and activities of the Corporation as might be required from time to time. Under Art. 40, subject to the provisions of the Companies Act and the directions and instructions issued from time to time by the President under Art. 51, the business of the Corporation is to be managed by the Board of Dirrectors. Under Art. 14 (a), subject to the provisions of S. 252 of the Companies Act, the President is to determine in writing from time to time the number of Directors of the Corporation which, however, is not to be less than two or more than twelve and under Art. 14 (b), at every annual general meeting of the Corporation, every Director appointed by the President is to retire but is eligible for reappointment. Under Art 15 (a), the President has the power at any time and from time to time to appoint any person as an additional Director. Under Art 16, the President has the power to remove any Director appointed by him from office at any time in his absolute discretion. Under Art. 17, the vacancy in the office of a Director appointed by the President caused by retirement, removal, resignation, death or otherwise, is to be filled by the President by fresh appointment. Artcle 18 provides that the Directors are not required to hold any share qualification. Under Article 37, the President may from time to time appoint one of the Directors to the office of the Chairman of the Board of Directors or to the office of the Manag-

ing Director or to both these offices for such time and at such remuneration as the President may think fit and the President may also from time to time remove the person or persons so appointed from service and appoint another or others in his or their place or places. Under Art. the Chairman of the Board has the power, on his own motion, and is bound, when requested by the Managing Director in writing, to reserve for the consideration of the President the matters relating to the working of the Corporation set out in the said Article. Article 42 lists the matters in respect of which prior approval of the President is required to be obtained. Under Article 47, the auditors of the Corportion are to be appointed or re-appointed by the Central Government on the advice of the Comptroller and Auditor-General of India. The said Article also confers power upo the Comptroller and Auditor-General of India to direct the manner in which the accounts of the Corporation are to be audited and to give the auditors instructions in regard to any matter relating to the performance of their function. Under the said Artice, he has also the power to conduct a supplementary or test audit of the accounts of the Corporation by such person or persons as he may authorize in that behalf and for the purposes of such audit to require such information or additional information to be furnished to such person or persons on such matters by such person or persons the Comptroller and Auditor-General may, by general or special order, direct.

5. Under Clause (v) of the Memo randum of Association, the authorzie share capital was rupees four crores. I was raised to rupees ten crores by special resolution passed at the Annua General Meeting of the Corporatio held on December 30, 1972, and furthe raised to rupees twenty crores by a special resolution passed at the Annua General Meeting held on Novembe 5, 1979.

6. The above facts and the provisions aforementioned of the Memorandum of Association and the Articles o Association clearly show that not onl is the Corporation a Government company of which all the shares were an are owned by the Central Governmen and two State Governments but is Government company which is unde the complete control and managemen of the Central Govenmernt.

7. A company called the "River Steam Navigation Company Limited" was carrying on very much the sam business including the maintenance an running of river service as the Corporation is doing. A Scheme of Arrangement was entered into between the sai Company and the Corporation. Th Calcutta High Court by its dated Ma 5, 1967, approved the said Scheme o arrangement and ordered the closure o the said Company and further directe that upon payment to all the creditor of the said Company, the said Compna would stand dissolved without windin up by an order to be obtained from th High Court and accordingly, upon payment tc all the creditors, the sai

Company was ordered to be dissolved. The said Scheme of arrangement provided that the assets and certain liabilities of the said Company would be taken over by the Corporation The said Scheme of Arrangement as approved by the High Court also provided as follows :

"(a) That the new Company shall take as many of the existing staff or labour as possible and as can be reasonably taken over by the said transferee Company subject to any valid objection to any individual employee or employees.

(b) That as to exactly how many can be employed it is left to the said transferee Company's bona fide discretion

(c) That those employees who cannot be taken over shall be paid by the transferor Company all moneys due to them under the law and all legitimate and legal compensations payable to them either under Industrial Disputes Act or otherwise legally admissible and that such moneys shall be provided by the Government of India to the existing transferor Company who will pay these dues"

8. The First Respondent in Civil Appeal No. 4412 of 1985, Brojo Nath Ganguly, was, at the date when the said Scheme of Arrangement became effective, working in the said Company and his services were taken over by the Corporation and he was appointed on September 8, 1967, as a Deputy Chief Accounts Officer. The First Respondent in Civil Appeal No. 4413 of 1985, Tarun Kanti Sengupta, was also working in the said Company and his services were also taken over by the Corporation and he was appointed on September 8, 1967, as Chief Engineer on the ship "River Ganga". It is unnecessary to refer at this stage to the terms and conditions of the letters of appointment issued to these two Respondents as they have been subsequently superseded by service rules framed by the Corporation except to state that under the said letters of appointment the age of superannuation was fifty-five years unless the Corporation agreed to retain them beyond this period. The said letters of appointment also provided that these Respondents would be subject to the service rules and regulations including the conduct rules. Service rules were framed by the Corporation for the first time in 1970 and were replaced by new rules in 1971.

9. We are concerned in these Appeals with the "Central Inland Water Transport Corporation Ltd Service Discipline and Appeal Rules" of 1979 framed by the Corporation These rules will hereinafter be referred to in short as "the said Rules". The said Rules apply to all employees in the service of the Corporation in all units in West Bengal, Bihar, Assam or in other State or Union Territory except those employees who are covered by the Standing Orders under the Industrial Employment (Standing Orders) Act, 1946, or those employees in respect of whom the Board of Directors has issued separate orders Rule 9 of the said Rules deals with termination of employment for acts other than misdemeanour,

The relevant provisions of the said Rule 9 relating to permanent employees are follows :

"9. Termination of Employment for Acts other than Misdemeanour.

(i) The employment of a permanent employee shall be subject to termination on three monts' notice on either side. The notice shall be in writing on either side. The Company may pay the equivalent of three months' basic pay and dearness allowance, if any, in lieu of notice or may deduct a like amount when the employee has failed to give due notice.

(ii) The services of a permanent employee can be terminated on the grounds of "Services no longer required in the interest of the Company" without assigning any reason. A permanent employee whose services are terminated under this clause shall be paid 15 days basic pay and dearness allowance for each completed year of continuous service in the Company as comensation. In addition he will be entitled to encashment of leave at his credit."

Under Rule 10, an employee is to retire on completion of the age of fifty-eight years though in exceptional cases and in the interest of the Corporation, an extension may be granted with the prior approval of the Chairman-cum Managing Director and the Board of Directors. Rule 11 provides as follows:

"11. Resignation.—
Employees who wish to leave the Company's services must give the Company the same notice as the Company is required to give them under Rule 9."

Rule 33 provides for suspension of an employee where a disciplinary proceeding against him is contemplated or is pending or where a case against him in respect of any criminal offence is under investigation or trial Rule 34 provides for payment of subsistence allowance during the period of suspension Rule 36 sets out the different penalties which can be imposed on an employee for his misconduct. These penalties are divided into minor and major penalties. Rule 37 is as follows:

"37. Acts of Misconduct.—
Without prejudice to the general meaning of the term 'misconduct' the Company shall have the right to terminate the services of any employee at any time without any notice if the employee is found guilty of any insubordination, intemperance or other misconduct or of any breach of any rules pertaining to service or conduct or non-performance of his duties."

Rule 38 prescribes the procedure for imposing a major penalty and sets out in detail how a disciplinary is to be held. Rule 31 provides for action to be taken by the disciplinary authority on the report made by the Inquiring Authority. Rule 40 prescribes the procedure to be followed for imposing minor penalties. Rule 43 provides for a special procedure to be followed in certain cases. This special procedure consists of dispensing with a disciplinary inquiry altogether. The said Rule 43 provides as follows:

"43 Special Procedure in Certain Cases.

Notwithstanding anything contained in Rule 38, 39 or 40 the disciplinary authority may impose any of the penalties specified in Rule 36 in any of the following circumstances :—

(i) The employee has been convicted on a criminal charge, or on the strength of facts or conclusions arrived at by a judicial trial; or

(ii) where the diciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these Rules; or

(iii) where the Board is satisfied that in the interest of the security of the Corporation/Company, it is not expedient to hold any inquiry in the manner provided in these rules."

Rule-45 provides for an appeal against an order imposing penalty to the appropriate authority specified in the Schedule to the said Rules and Rule 45—A provides for a review.

10. We are concerned in these Appeals with the validity of clause (i) of Rule 9 only.

11. So far as Ganguly, the First Respondent in Civil Appeal No. 4412 of 1985 is concerned, he was promoted to the post of Manager (Finance) in October 1980 and also acted as General Manager (Finance) from November 1981 to March 1982. On February 16, 1983, a confidential letter was sent to him by the General Manager (Finance), who is the Third Appellant in Civil Appeal No, 4412 of 1985, to reply within twenty-four hours to the allegation of negligence in the maintenance of Provident Fund Accounts, Ganguli made a representation as also gave a detailed reply to the said show cause notice, Thereafter by a letter dated February 26, 1983, signed by the Chairman-cum-Managing Director of the Corporation, a notice under clause (i) of Rule 9 of the said Rules was given to Ganguli terminating his service with the Corporation with immediate effect. Along with the said letter a cheque for three months' basic pay and dearness allowance was enclosed.

12. So far as Sengupta, the First Respondent in Civil appeal No. 4413 of 1985, is concerned, he was promoted to the post of General Manager (River Services) with effect from January 1, 1980. His name was enrolled by the Bureau of Public Enterprises and he was called for an interview for the post of Chairman-cum-Director of the Corporation by the Public Enterpises Selection Board. According to Sengupta, he could not appear before the Selection Board as he received the letter calling him for the interview after the date fixed in that behalf. According to Sengupta, the new Chairman-cum-Managing Director who was selected at the said interview bore a grudge against him for having competed against him for the said post and on February 1, 1983, he issued a charge-sheet against Sengupta intimating to him that a dis-

ciplinary inquiry was proposed to be held against him under the said Rules and calling upon him to file his written statement of defence. By his letter dated February 10, 1983, addressed to the Chairman-cum-Managing Director Sengupta denied the charges made against him and asked for inspection of documents and copies of statements of witnesses mentioned in the said charge-sheet. By a letter dated February 26, 1983, signed by the Chairman-cum-Managing Director notice was given to Sengupta under clause (i) of Rule 9 of the said Rule, terminating his service with the Corporation with immediate effect. Along with the said letter a cheque for three months' basic pay and dearness allowance in lieu of notice was enclosed.

13. Both Ganguly and Sengupta filed writ petitions in the Calcutta High Court under Art. 226 of the Constitution challenging the termination of their service as also the validity of the said Rule 9 (i). In both these writ petitions rule nisi was issued and an exparte ad interim order staying the operation of the said notice of termination was passed by a learned single Judge of the High Court. The Appellants before us went in Letters Patent Appeal before a Division Bench of the said High Court against the said ad interim orders, the appeal in the case of Ganguly being F.M.A.T. No., 1604 of 1983 and in the case of Sengupta being F. M. A. T. No. 649 of 1983. On January 28, 1985, the Division Bench ordered in both these Appeals that the said writ petitio should stand transferred to and hea by it along with the said appeals. Tl said appeals and writ petitions we thereupon heard together and by common judgment deliveried on Augu 9, 1985 (reported in 1986 Lab IC·494 the Division Bench held that the Co poration was a State within the me ning of Article 12 of the Constitutic and that the said Rule 9 (was ultra vires Article 14 the Constitution. Consequent the Division Bench struck down the sai Rule 9 (i) as being void. It also quashe the impugned orders of terminatio dated February 26, 1983. It is again the said judgment and orders of tl Calcutta High Court that the preser Appeals by Special Leave have bee filed.

14. The contentions raised on b half of the Corporation at the hearin of these Appeals may be thus summar zed :

(1) A Government company stand on a wholly different footing from statutory corporation for while a statu tory corporation is established by statute, a Government company is inco rporated like any other company b obtaining a certificate of incorporatio under the Companies Act and, ther fore, a Government company canno come within the scope of the term "th State" as defined in Article 12 of th Constitution.

(2) A statutory corporation is usu ally established in order to create monopoly in the State in respect of particular activity. A Government com

pany is, however, not established for this purpose.

(3) The Corporation does not have the monopoly of inland water transport but is only a trading company as is shown by the objects clause in its Memorandum of Association.

(4) Assuming a Government company is "the State" within the meaning of Article 12, a contract of employment entered into by it is like any other contract entered into between two parties and a term in that contract cannot be struck down under Article 14 of the Constitution of the ground that it is arbitrary or unreasonable or unconscionable or one-sided or unfair. At the hearing of these Appeals the Union of India, which is the Second Respondent in these Appeals, joined in the contentions raised by the Corporation.

15. The arguments advanced on behalf of the contesting Respondents in broad outlines were as follows :

(1) The definition of the expression "the State" given in Article 12 is wide enough to include within its scope and reach a Government Company

(2) A State is entitled to carry on any activity, even a trading activity, through any of its instrumentalities or agencies, whether such instrumentality or agency be one of the Departments of the Government a statutory corporation a statutory authority or a Government company incorporated under the Companies Act.

(3) Merely because a Government company carries on a trading activity or is authorized to carry on a trading activity does not mean that it is excluded from the definition of the expression "the State" contained in Article 12.

(4) A Government company being "the State" within the meaning of Article 12 is bound to act fairly and reasonably and if it does not do so, its action can be struck down under Article 14 as being arbitrary.

(5) A contract of employment stands on a different footing from other contracts. A term in a contract of empoyment entered into by a private emploloyer which is unfair, unreasonable and unconscionable is bad in law. Such a term in a contract of employment entered into by the State is, therefore, also bad in law and can be struck down under Article 14.

16. During the course of the hearing of these Appeals the Central Inland Water Transport Corporation Officers' Association made an application for permission to intervence in these Appeals and permission to intervene was granted to it by this Court. The said Association supported the stand taken by the contesting Respondents.

17. We will now examine the correctness of the rival submissions advance at the Bar.

18. The word "State" has different meanings depending upon the context in which it is used. In the sense of being a polity, it is defined in the Shorter Oxford English Dictionary, Third Edition. Volume II. page 2005, as "a body of people occupying a defined territory and

organized under a sovereign government". The same dictionary defines the expression "the State" as "the body politic as organized for supreme civil rule and government; the political organization which is the basis of civil government; hence, the supreme civil power and government vested in a country or nation". According to Black's Law Dictionary, Fifth Edition page 1262, "In its largest sense, a 'state' is a body politic or a society of men" According to Black the term "State". may refer "either to the body politic of a nation ie g. United States) or to an individual governmental unit of such nation (e.g. California)". In modern International practice, whether a community is deemed a State or not depends upon the general recognition accorded to it by the existing group of other States. A State must have a relatively permanent legal organization, determining its structure and the relative powers of its major governing bodies or organs. This legal organizational permanence of a State is to be found in its Constitution. With rare exceptions, such as the United Kingdom, most States now have a written Constitution. The constitutional structure of a State may be either unitary, as when it has a single system of government applicable to all its parts, or federal when it has one system of government operating in certain respects and in certain matters in all its parts and also separate governments operating in other respects in distinct parts of the whole. In such a case the units or sub-divisions having separate governments are variously called 'states' as in India, U. S. A. and Australia, 'provinces' as in Canada, 'cantons' as in Switzerland, or designated by other names.

19. Our Constitution is federal in structure, Clause (1) of Article 1 of the Constitution provides that "India, that is Bharat, shall be a Union of States" and clause (2) of that Article provides that "The States and the territories thereof shall be as specified in the First Schedule". The word "States" used in Article 1 thus refers to the federating units. India itself being a State consisting of these units. The term "States" is defined variously in some of the other Articles of the Constitution as the context of the particular Part of the Constitution in which it is used requires. Part V of the Constitution is headed. "The state" and provides for the from of three organs of a State, namely, the Executive, the legislature and the Judiciary, Article 152, which is the opening Article in Part VI of the Constitution, provides as follows :

> "152. Definition.—
>
> In this Part, unless the context otherwise requires the expression 'State' does not include the State of Jammu and Kashmir."

The State of Jammu and Kashmir is excluded because that State, though one of the States which constitute the Union of India, had, in pursuance of the provisions of Article 370 of the Constitution (Application to Jammu and Kashmir) order, 1954 (C.O.48) set up a Constituent Assembly for one internal Consstitution of the State and it had framed the

onstitution of Jammu and Kashmir
ich was adopted and enacted by that
onstituent Assembly on November 17,
65. Article 152 also, therefore, uses the
pression "State" as meaning the fede-
ting units which constitute the Union
India. Part XIV of the Constitution
als with services under the Union and
e States. Article 308 provides as
llows :

"308 Interpretation. —

In this Part, unless the context
herwise requires, the expression 'St-
e' does not include the State of Jam-
u and Kashmir."

This definition read with the other
ovisions of Part XIV shows that
e word "State" applies to the feder-
ing units (other than the State of
mmu and Kashmir for the reason
entioned above) which together con-
itute the Union of India because in
e other Articles of Part XIV wherever
e Union of India is referred to, it
described as "the Union" Article
66 of the Constitution defines certain
pression used in the Constitution of
dia. That Article, however, does
ot contain any definition of the term
State." Under Art. 367 (1), unless the
ontext otherwise requires, the General
lauses Act 1897 (Act No X of 1897),
bject to any adaptations and modi-
cations that may be made therein by
e President of Indian under Article
72 to bring that Act into accord with
e provisions of the Constitution,
plies for the interpretation of the
onstitution, Clause (58) of Section 3
f the General Clauses Act defines the
term "State" as follows :

"(58) 'State'

(a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act. 1956, shall mean a part A State, a Part B State or a Part C State, and

(b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union territory.

This definition, therefore, also confines the term "State" to the federating units which together form the Union of India.

20. We are concerned in these Appeals with Article 12. Article 12 forms part of Part III of the Constitution which deals with Fundamental Rights and provides as follows :

"12. Definition. —

In this Part, unless the context otherwise requires, **'the State'** includes the Government and Parliament of India and the Government and the Legislature of each of the State and all local or other authorities within the territory ot India or under the control of the Government of India" (Emphasis supplied) The same definition applies to the expression "the State" when used in Part IV of the Constitution which provides for the Directive Principles of State Policy, for the opening Article of Part IV, namely, Article 36, provides :

"36. Definition —

In this Part, unless the context

otherwise requires, the State' has the same meaning as in Part III "

the expression "local authority" is defined in clause (31) of section 3 of the General Clauses Act as follows :

> "(31) 'Local authority' shall mean a municipal committee, district Board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

21. Thus, the expression "the State" when used in Parts III and IV of the Constitution is not confined to only the federating States or the Union of India or even to both. By the express terms of Article 12 the expression "the State" includes-

(1) the Government of India,

(2) Parliament of India,

(3) the Government of each of the States which constitute the Union of India,

(4) the Legislature of each of the States which constitute the Union of India,

(5) all local authorities within the territory of India,

(6) all local authorities under the control of the Government of India,

(7) all other authorities within the territory of India, and

(8) all other authorities under the control of the Government of India,

22. There are three aspects of Art. 12 which require to be particularly noticed. These aspects are :

(i) the definition given in Art. is not an explanatory and restricti definition but an extensive definition.

(ii) it is the definition of the exp ession "the State" and not of the te "State" or "States", and

(iii) it is inserted in the Consti tion for the purposes of Parts III a IV thereof.

23 As pointed out in Craies Statute Law, Seventh Edition, pa 213, where an interpretation clau defines a word to mean a particul thing, the definition is explanatory a prima facie restrictive; and whene an interprpretation clause defines term to include something, the defi tion is extensive. While an explanato and restrictive definition confines t meaning of the work defined to what stated in the interpretation clause, that wherever the work defined us us in the particular statute in which t interpretation clause occurs, it will be only that meaning unless where, as usually provided, the subject or conte otherwise, an extensive definition exp nds or exdends the meaning of t word defined to include within it w would otherwise not have been comp hended in it when the word defin is used in its ordinary sense Arti 12 uses the word "includes". It th extends the meaning of the expressi "the State" so as to include within also what otherwise may not have be comprehended by that expression wh used in its ordinary legal sense.

24. Article 12 defines the expre

on "the State" while the other Articles of the Constitution referred to above such as Article 152 and Article 308, and clause (58) of Section 3 of the General Clauses Act define the term "State". The deliberate use of the expression "the State" in Art. 12 as also in Art. 36 would have normally shown that this expression was used to denote the State in its ordinary and Constitutional sense of an independent or sovereign State and the inclusive clause in Art. 12 would have extended this meaning to include within its scope whatever has been expressly set out in Art 12 The definition of the expression "the State" in Art. 12 is, however, for the purposes of Parts III and IV of the Constitution. The contents of these two parts clearly show that the expression "the State" in Art. 12 as also in Art. 36 is not confined to its ordinary and Constitutional sense as extended by the inclusive portion of Art. 12 but is used in the concept of the State in relation to the Fundamental Rights guaranteed by Part III of the Constitution and the Directive Principles of State Policy contained in Part IV of the Constitution which Principles are declared by Art 37 to be fundamental to the governance of the country and enjoins upon the State to apply in making laws.

25. What then does the expression "the State" in the context of Part III and IV of the Constitution mean ?

26. Men's concept of the State as a polity or a political unit or entity and what the functions of the State are or should be have changed over the years and particularly in the course of this century. A man cannot obstinately cling to the same ideas and concepts all his life. As Emerson said in his essay on "Self-Reliance". "A foolish consistency is the hobgoblin of little minds". Man is by nature ever restless, ever discontent, ever seeking something new ever dissatisfied with what he has. This inherent trait in the nature of man is reflected in the society in which he lives for a society is a conglomerate of men who live in it. Just as man by nature is dissatisfied, so is society. Just as man seeks something new, ever hoping that a change will bring about something better, so does society. Old values, old ideologies and old systems are thus replaced by new ideologies, a new set of values and a new system; they in their turn to be replaced by different ideologies, diferent values and a different system. The ideas that seem revolutionary become outmoded with the passage of time and the heresies of today become the dogmas of tomorrow. What proves to be adequate and suited to the needs of a society at a given time and in particular circumstances turns out to be wholly unsuited and inadequate in diferent times and under different times and under different circumstances.

27. The story of mankind is punctuated by progress and retrogression. Empries have risen and crashed into the dust of history. Civilizations have flourished, reached their peak and passed away. In the year 1625, Carew, C. J., while delivering the opinion of

the House of Lords in Re the Earldom of Oxford, (1625) W Jo 96. 101 SC (1626) 82 ER 5053 in a dispute relating to the descent of that Earldom, said :

> "and yet time hath his revolution there must be a period and an end of all temporal things, finis rerum, an end of names and dignities, and whatsoever is terrene."

The cycle of change and experiment, rise and fall, growth and decay, and of progress and retrogression recurs endlessly in the history of man and the history of civilization. T.S. Eliot in the First Chorus from "The Rock" said:

> "O perpetual revolution of configured stars,
>
> O perpetual recurrence of determined seasons,
>
> O world of spring and autumn, birth and dying;
>
> The endless cycle of idea and action
>
> Endless invention, endless experiment".

28. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heart beats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable, the early nineteenth century essayist and wit, Sydney Smit, said, "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologise. Legislatures are, however not best fitted for the role of adapting the law to the necessities of the time, for the legislative process is too slow and the legislatures often divided by politics slowed down by periodic elections and overburdened with myriad other legislative activities. A constitutional document is even less suited to this task, for the philosophy and the ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending a Constitution is too cumbersome and consuming to meet the immediate needs. This task must, therefore, of necessity fall upon the courts because the courts can by the process of Judicial interpretation adapt the law to suit the needs of the society.

29. A large number of authorities were cited before us to show how the courts have interpreted the expression "the State" in Article 12. As these authorities are decisions of this Court, we must perforce go through the whole gamut of them though we may preface an examination of these authorities with the obseravation that they only serve to show how the concepts of this Court have changed both with respect to Article 12 and Article 14 to keep pace with changing ideas and altered circumstances. Before embarking upon this task we would, task we would, however, like, to quote the following passage (which has become a classic) from the opening paragraph of Justice Oliver Wendell Holmes's "The

portNo. 55, p. 15

mmon Law" which contains, the lecres delivered by him while teaching v at Harvard and which book was blished in 1881 just one year before was appointed an Associate Justice the Massachusetts Supreme Judcial ourt :

> "It is something to show that the nsistency of a system requires a partilar result, but it is not all. The life law has not been logic : it has been perience The felt necessities of the ne, the prevalent moral and political eories, intuitions of public policy, owed or unconscious, even the prejuces which judges share with their low-men, have had a good deal more do than the syllogism in determining e rules by which men should be goverd. The law embodies the story of a tion's development through many nturies, and it cannot be dealt with if it contained only the exicms and rollaries of a book of mathematics. order to know what it is, we must ow what it has been, and what it nds to become. We must alternately nsult history and existing theories legislation. But the most difficult bour will be to understand the combiation of the two into new products at ery stage. The substance of the law at y given time pretty nearly corresonds, so far as it goes, with what is an understood to be convenient; but s form and machinery, and the degree which it is able to work out desired sults, depend very much upon its ast."

30. We will, therefore, briefly sketch the temper of the time in which our Constitution was enacted and the purposes for Which Parts III and Iv were inserted in our Constitution.

31. The bombs which had rained down upon the cities of Europe, Africa and Asia and the Islands in the Pacific had changed, and changed dramatically, not only the political but also the sociological, ideological and economic map of the world. A world reeling from the horrors of the Second World War and seeking to recover frm the trauma caused by its atrocities sought to band all nations into one Family of Man and for this purpose set up the United Nations Organization in order to save succeeding generations from the scourge of war which had twice in this century brought untold sorrow to mankind and in order to reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of man and woman and of nations large or small, and thus to give concrete shape to the dream of philosophers and poets that the war-drums would throb no longer and the battle-banners would be furled in the parliament of Man and the Federation of the world. But much had gone before. There was the signing of the Inter-Allied Declaration of June 12, 1941, at St. James's Palace in London by the representatives of the United Kingdom, the Common-wealth, General de Gaulle and the governments in exile of the European countries conquered by Nazi Germany; there was the Atlantic Charter of August 14, 1941; there was the declaration of the United Nations

signed on New Year's Day of 1942 at washington, D.C., by twenty six rations who were fighting the Axis; there was the Declaration made at the Moscow Conference in October 1943 and at the Teheran Conference of December 1, 1943; there was the Dumbarton Oaks Conference held in Washington, D C., in August and September 1944; there was the Yalta Conferenee in February 1945; all these culminating in the adoption on June 25, 1945, of the Charter of the United Nations in the Opera House of San Francisco and the affixing of signatures thereon the next day in the auditorium of the Veterans' Memorial Hall. Thereafter, in pu suance of Article 68 of the Charter of the United States, the Economic and Social Council set up the Human Rights Commission in 1946 This Commission began its work in January 1947 under the chairmanship of Mrs. Eleanore Roosevelt, the widow of President Franklin D. Roosevelt. The Universal Declaration of Human Rights prepared by the Commission was adopted by the General Assembly on December 10, 1908, at its session held in the Palais de Chaillot in Paris. Of the fifty-eight nations represented at that Session, none voted against it two were absent, and eight abstained from voting.

32. It was thus in an atmosphere surcharged with human suffering and yet a firm resolve nor to succumb to it that the Constituent Assembly which was set up to frame the Constitution of India embarked upon its task on December 9, 1946, re assembled after the midnigt of August 14, 1947, as the sovereign Constituent Asembly for Ind
After partition and fresh election in t
new provinces of West Begal and E
Punjab, it re-assembled on October
1947, and thereafter on November
1949, adopted and enacted the Cons
tution of India

33 Before commencing its wo
Constituent Asesmbly adopted a Res
ution leaving down its objectives :

"1. This Constituent Asseml
declares its firm and solemn resolve
proclaim India as an Independent So
reign Republic and to draw up for h
future governance a constitution;...

4 Wherein all power and auth
rity of the Sovereign Independent Ind
its constituent parts and organs of go
rnment, are derived from the peop
and

5. Wherein shall be guarante
and secured to all the people of Ind
justice, social, economic and politica
equality of status, of opportunity, a
before the law; freedom of thought, ex
ression, belief, faith, worship vocati
association and action, subject to l
and public morality; and

6. Wherein adequate safeguar
shall be provided for minorities, bac
ward and tribal areas, and depress
and other backward classes; and

7. Whereby shall be maintain
the integrity of the territory of the Re
ublic and its sovereign rights on lan
sea, and air according to justice and t
law of civilised nations; and

8. This ancient land attains
rightful and honoured place in the wor

d makes its full and willing contribu-
on to the promotion of world peace
d the welfare of mankind".

34. In its strict legal sense the
itten Constitution of a country is a
cument which defines the regular form
system of its government, containing
rules that directly or indirectly
ect the distribution or exercise of the
vereign power of the State and it is
is mainly concerned with the creation
the three organs of the State, the
ecutive, the legislature and the judici-
/, and the distribution of
vernmental power among them
d the definition of their mutual relat-
n (see Shankari Prasrad Singh Deo v.
nion of India, 1952 SCR 89, 106 :
IR SC 458 at P 463) ; O. Hood Phi-
os' "Constitutional and Administra-
e Law " Sixth Edition, page 11; Dic-
s "An Introduction to the Study of
Law of the Constitution". Tenth
ition, page 23; and Jowitt's Diction-
of English Law, Second Edition,
lume I, page 430)

35. The framers of our Constitu-
n did not however, want to frame
the Sovereign Democratic Republic
ich was to emerge from their labours
Constitution in the strict legal sense.
ey were aware that there were other
nstitutions which had given expres-
n to certain ideals as the goal
wards which the Country should
ive and which had defined the
inciples considered fundamental to
governance of the country. They
re aware of the events that had culm-
inated in the Charter of the United Nations. They were aware that the Universal Declaration of Human Rights had been adopted by the General Assembly of the United Nations, for India was a signatory to it. They were aware that the Universal Declaration of Human Rights contained certain basic and fundamental rights appertaining to all men. They were aware that these rights were born of the philosophical speculations of the Greek and Roman Stoies and nurtured by the jurists of ancient Rome. They were aware that these rights had found expression in a limited form in the accords entered into between the rulers and their powerful nobles, as for instance, the accord of 1188 entered into between King Alfonso IX and the Cortes of Leon, the Magna Carta of 1215 wrested from King John of England by his barons on the Meadow of Runnymede and to which he was compelled to affix his Great Seal on a small island in the Thames in Buckinghamshire—still called Magna Carta Island, and the guarantees which King Andrew II of Hungary was forced to give by his Golden Bill of 1822. They were aware of the international treaties of the mid-seventeenth century for safeguarding the right of religious freedom and the rights of aliens. They were aware of the full bloosoming of the concept of Human Rights in the writings of the "philosophes" such as Voltaire, Rousseau, Diderot, Rayal, d'Almbert and others, and of the cencrete expression given to it in the various Declarations of Rights of the American Colonies (particularly

Virginia) and in the American Declaration of Independence. They were aware that in 1789, during the early years of the French Revolution, the French National Assembly had in "The Declaration of the Rights of Man and of the Citizen" proclaimed these rights in lofty words and that Revolutionary France had translated them into practice with bloody deeds. They were aware of the treaties entered into between various States in the nineteenth century providing protection for religious and other minorities. They were aware that these rights had at last found universal recognition in the Universal Declaration of Human Rights. They were aware that the first ten Amendments to the Constitution of the United States of America contained certain rights akin to Human Rights. They knew that the Constitution of Eire contained a chapter headed "Fundamental Rights" and another headed "Directive Principles of State policy". They were aware that the Constitution of Japan also contained a chapter headed "Rights and Duties of the people". They were aware that the major traditional functions of the State have been the defence of its territory and its inhabitants against external aggression, the maintenance of law and order the administration of justice, the levying of taxes and the collection cf revenue. They were also aware that increasingly, and particularly in modern times, several State have assumed numerous and wide-ranging functions, especially in the fields of education, health, social security, control and maintenance of natural resources
and natural assets, transport and com
unication services, and operation
certain industries communication ser
ces, and operation of certain industr
considered basic to the economy a
growth of the nation. They were al
aware that Section 8 of Article 1 of t
Constitution of the United States
America contained "a welfare claus
empowering the federal government
enact laws for the overall general we
are of the people. They were awa
that countries such as the United Stat
the United Kingdom and Germany h
passed social welfare legislation.

36. The framers of our Consti
tion were men of vision and ideals, a
many of them had suffered in the cau
of freedom. They wanted on idealisi
and philosophic base upon which
raise the administrative superstructu
of the Constitution. They, therefo
headed our Constitution with a prea
ble which declared India's goal and ins
rted Parts III and IV in the Constituti

37. The Preamble to the Const
tution, as amended by the Constituti
(Forty-second Amendment) Act, 197
proudly proclaims :

"WE, THE PEOPLE OF INDI
having solemnly resolved to constitu
India into a SOVEREIGN SOCIALIS
SECULAR DEMOCRATIC REPU
LIC and to Secure to all its citizens :

JUSTICE, social, economic a
political;

LIBERTY of thought, expressio
belief, faith and worship;

EQUALITY of Status and of opp

rtunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY the twenty sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

38. Part III of the Constitution gives a Constitutional mandate for certain Human Rights Fundamental Rights in the Constitution-adapted to the needs and requirement of a country only recently freed from foreign rule and desirous of forging a powerful nation capable of taking an equal place among the nations of the world. It also provides a Constitutional mode of enforcing them. Amongst these Rights is the one contained in Article 14 which provides :

"14. Equality before law—

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

39. Part IV of the Constitution prescribes the Directive Principles of State Policy. These Directive Principles have not received the same Constitutional mandate for their enforcement as the Fundamental Rights have done. In the context of the Welfare State which is the goal of our Constitution. Articles 37 and 38(1) are important. They are as follows :

"37. Application of the Principles contained in this Part—

The provisions contained in this Part shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."

"38. (1) State to secure a social order for the promotion of welfare of the people—

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, Social economic and political, shall inform all the institutions of the national life." Under Clause (a) of Article 39, the State is in particular, to direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41 directs that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work.

40. The difference between Part III and Part IV is that while Part III prohibits the State from doing certain things (namely, from infringing any of the Fundamental Rights), Part IV enjoins upon the State to do certain things. This duty, however, is not enforceable in law but nonetheless the Court cannot ignore what has been enjoined upon the State by Part IV, and though the Court may not be

able actively to enforce the Directive Principles of State Policy by compelling the State to apply them in the governance of the country or in the making of laws the Court can, if the State commits a breach of its duty by acting contrary to these Directive Principles, prevent it from doing so.

40. In the working of the Constitution it was found that some of the provisions of the Constitution were not adequate for the needs of the country or for ushering in a Welfare State and the constituent body empowered in that behalf amended the Constitution several times. By the very first amendment made in the Constitution, namely by the Constitution (First Amendment) Act, 1951, Clause (6) of Article 9 was amended with retrospetive effect. Under this amendment, sub-clause (g) of Clause (1) of Article 19 which guarantees to all citizens the right to carry on any occupation, trade or business, was not to prevent the State from making any law relating to the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial of citizens or otherwise. This amendment also validated the peration of all existing laws in so far as they had made similar provisions. Article 298, as originally enacted, provided that the executive power of the Union and of each State was to extend subject to any law made by the appropriate Legislature, to the grant sale, disposition or mortgage of any property held for the purposes of the Union or of such State, as the case may be, and to the purchase or acquisition of property for those purposes respectively, and to the making of contracts; and it further provided that all property acquired for the purposes of the Union or of a State was to vest in the Union or in such State, as the case may be. Article 298 was substituted by the Constitution (Seventh Amendment) Act, 1956. As substituted, it provides as follows:

> "298 Power to carry trade, etc.—
>
> The executive power of the Uninn and each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose;
>
> Provided that —
>
> (a) the said executive power of the Union shall, in so for as such trade or business or such purpose is not one with respect to which Parliament may make laws be subject in each State to legislation by the State: and
>
> (b) the said executive power of each State shall, in so for as such trade or business or such purpose is not one with respect to which the State Legislature may make laws be subject to legislation by Parliament"

Article 298, as so substituted, therefore, expands the executive power of the Union of India and of each of the States which collectively constitute the Union to carry on any trade or business. By extending the executive power of the

eport No. 55, p. 21

D. P. Madon
Judge
Supreme Court of India

nion and of each of the States to
e carrying on of any trade or busi-
ss. Article 298 does not, however,
nvert either the Union of India or any
' the States which collectively form
e Union into a merchant buying and
lling goods or carrying on either tra-
ng or business activity, for the exec-
tive power of the Union and of the
tates, whether in the field of trade or
usiness or in any other field, is alw-
ys subject to Constitutional limitati-
ns and particularly the provisions
lating to Fundamental Rights in Part
I of the Constitution and is exercis-
ble in aecordance with and for the
rtherance of the Directive Principles
f State Policy prescribed by Part IV of
e Constitution.

42. The State is an abstract ent-
y and it can, therefore, only act thro-
gh its agencies or instrumentalities,
hether such agency or instrumental-
ty be human or juristic. The trading
nd business activities of the State
onstitute "public enterprise". The
tructural forms in which the Govern-
ent operates in the field of public
nterprise are many and varied. These
nay consist of Government depart-
ments, statutory bodies, statutory cor-
orations, Government companies, etc.
n this context, we can do no better
han cite the following passage from
'Government Enterprise-A Compa-
rative Study" by W. Friedmann and J.
F. Garner, at page 507:

"The variety of forms in which the
various States have, at different times,
proceeded to establish public enterprises i. e almost infinite, but three main types emerge to which almost every public enterprise approximates: (1) departmental administration; (2) the joint stock company controlled completely or partly by public authority; and finally (3) the public corporation proper, as a distinct type of corporation different from the private law company. Each of these three types will be briefly analysed in a comparative perspective.

As the tasks of Government multiplied, as a result of defence needs, post war crises, economic depressions and new social demands, the framework of civil service administration became increasingly insufficient for the handling of the new tasks which were often of a specialised and highly technical character. At the same, time, 'bureaucracy triumphant.' In France the Gonfederation General du Travail (GGT) had stated in its programme in 1920 that 'we do not wish to increase the functions of the State itself nor strengthen a system which would subject the basic industry to a civil service regime, with all its lack of responsibility and its basic defects, a process which would subject the forces of production to a fiscal monopoly...' This distruct of government by civil service, justified or not, was a powerful factor in the development of a policy of public administration through seperate corporation which would operate largely according to business principles and be separtely accountable In the common law countries, where the Government still enjoys consideralbe immunities and privileges in the fields of legal responsibility, taxation, or the binding force of Statutes,other considerations played their part. It seemed necessary to create bodies which if they were to compete on fair terms in the economic field, had to be separated and distinct from the Government as regards immunities and privileges."

43. The immunities and privileges possessed by bodies so set up by the Government in India cannot, however, be the same as those possessed by similar bodies established in the private sector because the setting up of such bodies is referable to the executive power of the Government under Article 298 to carry on any trade or business. As pointed out by Mathew, J, in Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi (1975) 3 SCR 619 (at page 648): (AIR 1975 SC 1331 at P. 1352). "The governing power wherever located must be subject to the fundamental constitutional limitations." The privileges and immunities of these bodies, therefore, are subject to Fundamental Rights and exercisable in accordance with and in furtherance of the Diretive Principles of State Policy.

44. It is in the context of what has been stated above that we will now review the authorities cited at the Bar When we consider these authorities We will see how as Constitutional thinking developed and the conceptual horizon widened, new vistas, till then shrouded in the mist of conventional legal phraseology and traditional orthodoxy, opened out to the eye of judicial inte pretation, and many different facets several Articles of the Constitutio including Arts 12 and 14, hither unperceived, become visibe. Ther however, still remain vistas yet to l opened up, veils beyond which we toda cannot see to be lifted, and doors which we still have found no key to l unlocked.

45. In Ram Jawaya Kapur v. Sta of Punjab (1955) 2 SCR 225: (AIR 19 SC 549) the State of Punjab, which use to select books published by priva publishers for prescribing them as tex books and for this purpose used to invi offers from publishers and author altered that practice and amended th notification in that behalf so that ther after only authors were asked to subm their books for approval as text-book The validity of this notification wa challenged inter alia on the ground tha the executive power of a State unde Article 162 extended only to executin the laws passed by the legislature c supervising the enforcement of suc laws under Article 162, subject to th provisions of the Constitution the exe utive power of a State extends to th matters with respect to which the Legislature of the State has power to mak laws, namely, the matters enumerate in the State List (List II) in the sevent Schedule to the Constitution Unde the proviso to that Article, in any ma ter with respect to which the Legislatu of a State and Parliament have powe to make laws, that is, the matter enumerated in the Concurrent List (Lis

III) in the Seventh Schedule to the Constitution, the executive power of the State is to be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. Under Article 154 (1), the executive power of the State is vested in the Governor and is to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. The corresponding provisions as regards the executive power of the Union of India are contained in Article 73 and Article 53 (1). Repelling the above contention, Mukherjea, C J. who spoke for the Constitution Bench of the Court observed (at page 230) (of SCR) :

"A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community."

The following passage (at page 235-36) (of SCR) from thejudgment of the Court in that case with respect to the meaning of the expression "executive function" is instructive and requires to be reproduced :

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate accumption, by one organ or part of the State of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legi lature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrving out of these laws"

(Emphasis supplied)

46. In Rajasthan State Electricity Board, Jaipur v. Mohan Lal, (1967) 3 SCR 377 : (AIR 1967 SC 1857) a Constitution Bench of this Court by a majority held that the Electricity Board of Rajasthan constituted under the Electricity (Supply) Act, 1948 (Act No 54 of 1948) was "the State" as defined in Article 12 because it was "other authority" within the meaning of that Article. The Court held that the expression "other authority" was wide enough to include within it every authority created by a statute, on which powers are confe-

rred to carry out governmental or quasi-governmental functions and functioning within the territory of India or under the Control of the Government of India and the fact that some of the powers conferred may be for the purpose of carrying on Commercial activities is not at all material because under Articles 19 (1)(g) and 298 even the State is empowered to carry on any trade or business. The Court further held that in interpreting the expression "other authority" the principle of ejusdem generis should not be applied, because, for the application of that rule, there must be distinct genus or category running through the bodies previously named; and the bodies specially named in Article 12 being the Executive Government of the Union and the States and local authorities, there is no common genus running through these named bodies, nor could these bodies be placed in one single category on any rational basis.

47. Praga Tools Corporation V. C. V. Imanual, (1969) 3 SCR 773 :(AIR 1969 SC 1306) was a case heavily relied upon by the Appellants. Praga Tools Corporation was a company incorporated under the Companies Act, 1913, and therefore, a company within the meaning of the Companies Act, 1956. At the material time the Union of India held fifty-six per cent of the shares of the Company and the Government of Andhra Pradesh held thirty-two per cent of its shares, the balance of twelve per cent shares being held by private individuals. As being the largest shareholder, the Union of India had the power to nominate the Company's directors. The company had entered into two settlements with its workmen's union. These settlements were arrived at and recorded in the presence of the Commissioner of Labour Subsequently, the company entered into another agreement with the union, the effect of which was to enable the company, notwithstanding the earlier two settlements, to retrench ninety-two of its workmen. Some of the affected workmen thereupon filed a writ petition under Art. 226 of the Constitution in the Andhra pradesh High Court challenging the validity of the subsequent agreement. A learned Single Judge of the High Court dismissed the petition on merits. In appeal, a Division Bench of that High Court held that the Company being one registered under the Companies Act and not having any statutory duty or function to perform was not one against which a writ for mandamus or any other writ could lie. The Division Bench, however, held that though the writ petition was not maintainable the High Court could grant a declaration in favour of the petitioners that the impugned agreement was illegal and void and granted the said declaration. In appeal by the company, a two Judge Bench of this Court held that the Company being a non-statutory body and one incorporated under the Companies. Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus. So far as declaration given by the Division Bench of the High Court was concerned, the

ourt held (at page 780) (of SCR) :

'In our view once the writ petition as held to be misconceived on the round that it could not lie against a ompany which was neither a statutory ompany nor one having public uties or responsibilities imposed on it y a statute, no relief by way of a declaation as to invalidity of an impugned greement between it and its employees ould be granted. The High Court n these circumstances ought to have ft the workmen to resort to the remey available to them under the Indusrial Disputes Act by raising an indusrial dispute thereunder."

Though this case was strongly relied pon by the Appellants, we fail to see ow it is relevant to the submissions dvanced by the Appellants The subsquent agreement enabling the company o retrench some of its workmen was hallenged on the ground that it was in reach of the earlier settlements entered ato between the company and the workaen's union. No question of violation f any of the Fundamental Rights was t all raised in that case. The only queson which feel for determination was hether a writ of mandamus can issue o compel the performance of the earlier ettlements or to restrain the enforcenent of the impugned subsequent agreenent and the dispute, therefore, was ne which fell within the scope of the ndustrial Disputes Act, 1947 (Act No. 4 of 1947).

48. In State of Bihar v. Union of India (1970) 2 SCR 522 : (AIR 1970 SC 1446), the State of Bihar filed nine suits under Article 131 in connection with the delayed delivery of iron and steel materials for the canstruction work of the Gandak project. In all these suits the first defendant was the Union of India while the second defendant in six of these suits was the Hindustan Steel Ltd and in the remaining three, the Indian Iron and Steel Company Ltd. This Court held that the specification of the parties in Article 131 was not of an extensive kind and excluded the idea of a private citizen, a firm or a corporation figuring as a disputant either alone or even along with a State or with the Government of India in the category of a party to the dispute under Art. 131. The Court further held that the enlarged definition of the expression "the State" given in Parts III and IV of the Constitution did not apply to Art. 131 and, therefore, a body like the Hindustan Steel Ltd. could not be considered as "a State" for the purpose of Art. 131. We fail to see in what way this decision is at all relevant to the point. The question before the Court in that case was whether the Hindustan Steel Ltd. or the Indian Iron and Steel Company Ltd. was a State to enable a suit to be filed against it under Art. 131 and not whether either of these companies fell within the scope of the definition of the expression "the State" in Art. 12.

49. Another authority relied upon by the appellants was S. L. Agarwal v. General Manager, Hindustan Steel Ltd.

(1970) 3 SCR 363 : (AIR 1970 SC 1150). The facts of that case and the contentions raised thereunder show that this authority is equally irrelevant. In that case an employee of the Hindustan Steel Ltd, whose services were terminated, filed a petition under Art. 226 claiming that such termination was wrongful as it was really by way of punishment as the provisions of Art. 311(2) of the Constitution had not been complied with. This Court held that the protection of Cl. (2) of Art. 311 was available only to the categories of persons mentioned in that clause and that though the appellant held a civil post as opposed to a militaty post, it was not a civil post under the Union or a State and, therfore, he could not claim the protection of Art. 311 (2). The contention which was raised on behalf of the appellant was that as Hindustan Steel Ltd. was entirely financed by the Government and its management, the post was virtually under the Goverment of India. This contention was rejected by the Court holding that the company had its independent existence and by law relating to corporations it was distinct from its members and, therefrre, it was not a department of the Government not were its employees servants holding posts under the Union. No question arose in that case whether the company was "tht State" within the meaning of Art. and all that was sought to be contended was that it was a department of the Government.

50. In Sabhajit Tewary v. Union of India (1975) 3 SCR 616 : (AIR 1975 SC 1329) this Court held that the Council of scientific and Industrial Researc which was a society registered unde the Societies Registration Act was no an authority within the meaning of Art 12 and, therefore, certain letters writte by it to the petitioner with respect t his remuneration could not be challenged as being discriminatory and violative of Art. 14. The contention raised i that case was that the rules governin the said Council showed that it wa really an agent of the Government. Thi Court rejected the said contentio in these words.

"This contention is unsound. The Society does not have a statutory character like the Oil and Natural Gas Commission, or the Life Insurance Corporation or Industrial Finance Corporation. It is a society incorporated in accordance with the provisions of the Societies Registration Act. The fact that the Prime Minister is the President or that the Government appoints nominees to the Governing Body or that the Government may terminate the membership will not establish anything more than the fact that the Government takes special care that the promotion, guidance and co-operation of scientific and industrial research, the institution and financing of specific researches, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study or problems affecting particular industry in a trade, the utilisation of the result of the researches onducted under the auspices of the ouncil towards the development of dustries in the country are carried out a responsible manner."

51. We now come to a case of onsiderable importance, namely, ukhdev Singh v, Bhagatram Sardar ingh Raghuvanshi (1975 (3) SCR 619 : IR 1975 SC 1331). Two questions fell be determined in this case, namely) whether statutory corporations are omprehended within the expression the State" as defined in Art. 12 and i) whether the regulations framed by statutory corporation in exercise of e power conferred by the statute creang the corporation have the force of w. The majority of a Constitution ench of this Court answered both these uestions in the affirmative. The statury corporations before the Court in at case were the Oil and Natural Gas ommission established under the Oil nd Natural Gas Commission Act, 1956 e Life Insurance Corporation establised under the Life Insurance Corporaon Act, 1956, and the Industrial Fince Corporation established under the ndustrial Finance Corporation Act, 948 Ray. C.J,, speaking for himself nd Chandrachud and Gupta, JJ,, pointed out (at page 634) (of SCR) at "The State under-takes ommercial functions in combinaion with Governmental functions in a elfare State." The majority held that the State" as defined in Art. 12 comrehends bodies created for the purpose f promoting economic intersts of the eople and the circumstance that statutory bodies are required to carry on some activities of the nature of trade or commerce does not indicate that they must be excluded from the scope of the expression "the State", for a public authority is a body which has public or statutory duties to perform and which performs those duties and carries on its transactions for the benefit of the public and not for private profit and by that fact such an authority is not excluded from making a profit for the public benefit. Mathew, J., in his concurring judgment held that a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as State action. The learned Judge observed (at pages 651-52) (of SCR) :

> Institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the function performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government function. This demands the delineation of a theory which requires government to provide all persons with all fundamentals of life and the determinations of aspects which are fundamental. The State today has an affirmative duty of seeing that all essentials of life are made available to all persons. The task of the State today is to make possible the achievement of a Good life both by removing obstacles in the path of such achievements and in assisting individual in realizing his ideal of self-perfection. Assuming that

indispensable functions are government functions, the problem remains of defining the line between fundamentals and non fundamentals. The analogy of the doctrine of 'business affetced with a public interest' immediately comes to mind.

After referring to the relevant provisions of the Acts under which the above statutory bodies were established, Mathew, J., continued (at pages 654-5) (of SCR) :

"The fact that these corporations have independent personalities in the eye of law does not mean that they are not subject to the control of government or that they are not instrumentalities of the government. These corporations are instrumentalities or agencies of the State for carrying on businesses which otherwise would have been runeb by the State departmentally. If the State had chosen to carry on these businesses through the medium of government departments, there would have been no question that actions of these departments would be 'State actions'. Why then should actions of these corporations be not State actions ?......

The ultimate questions which is relevant for our purpose is whether such a corporation is an agency or instrumentality of the government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the corporation carrying on the business? When it is seen from the provisions of that on liquidation of the Corporation, its assets should be divided among the shareholders, namely, the Central and State Governments and others, if any, the implication is clear that the benefit of the accumulated income would go to the Central and State Governments. Nobody will deny that an agent has a legal personality different from that of the principal. The fact the agent is subject to the direction of the principal does not mean that he has no legal personality of his own. Likewise, merely because a corporation has legal personality of own, it does not follow that the corporation cannot be an agent or instrumentality of the State, if it is subject to control of government in all important matters of policy. No doubt, there might be some distinction between the nature, of control exercised by principal over agent and the control exercised by government over public corportion. That, I think is only a distinction in degree. The crux of the matter is that public corporation is a new type of institution which has sprung from the new social and economic functions of government and that it therefore does not neately fit into old legal categories. Instead of forcing it into them, the later should be adapted to the needs of changing ting times and conditions"

(Emphasis supplied)

52. Various aspects of the question which we have to decide were exhaustively considered by this Court in Ramana Dayaram Shetty v. International Airport Aurthority of India, (1979) 3SCR 1041: (AIR 1979 SC 1628). In that case the Court observed (at p. 1032 of SCR) : (at p. 1636 of AIR), "Today the Government, as a welfare State, is the regulator

and dispenser of special services and provider of a large number of benefits, including jobs, contracts licences, quotas, mineral rights, etc." the question in that case was whether the International Airport Authority constituted under the International Airpots Authority Act, 1971, came within the meaning of the expression "The State" in Art. 12. Under the Act, the Authority was a body corporate havingper petual succession and a common seal and was to consist of a Chairman and certain ather members appointed by the Central Government. The Central Government had the power to terminate the appointment of or remove any member from the Board. Although the Authority had no share capital of its own, capital need by it for carrying out its functions was to be provided only by the Central Government. While considering the question whether such a body corporate was included within the expression 'the State", this Court said:

"A corporation may be created in one or two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registartion Act, 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorprration, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a corporation incorporated under law is managed by a board of directors or committee of managment in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or ageney of Government?"

(Emphasis supplied)

After considering various factors and the case law on the subject, the Court thus summed up the position :

"It will thus be seen that there are several factors which may have to be considered in determining whether a corporation is an agency or instrumentality of Government. We have referred to some of these factors and they may be summarised as under : Whether there is any financial assistance given by the State, and if so what is the magnitude of such assistance whether there is any other form of assistance, given by the State, and if so, whether it is of the usual kind or it ii extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions. This particularisation of relevant factors is however not exhaustive and by its very nature it cannot be, because with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relations between the corporation and Government calling for flexibility, adaptability and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether corporation is governmental instrumentality or agency. Moreover even amongst these factors which we have described, no one single factor will yield a satisfactory answer to the question and the Court will have to consider the cumulative effect of these various factors and arrive at its decision on the dasis of a particularised inquiry into the facts and circumstances of each case."

In the course of its judgment, the Court distinguished the case of Praga Tools Corporation, (AIR 1969 SC 1306) as also the decision in S. L. Agarwal v. General Manager, Hindustan Steel Ltd. (AIR 1970 SC 1150) in very much the same manner as we have done. So far as the case of Sabhajit Tewary v. Union India, (AIR 1975 SC 1329) is concerned, the Court said as follows:

"Lastly, we must refer to the decision in Sabhajit Tewari v. Union of India where the question was whether the Council of Scientific and Industrial Research was an 'authority' within the meaning of Art. 12 The Court no doubt took the view on the basis of facts relevaant to the Constitution and functioning of the Council that it was not an 'authority' but we do not find any discussion in this case as to what are the features which must be present before a corporation can be regarded as an 'authority' within the meaning of Art 12. This decision dose not lay down any principle or test for the purpose of determining when a corporation can be said to be an 'authority.' If at all any test can be gleaned from the decision, it is whether the Corporation is "really an agency of the Government." The Court seemed to hold on the facts that the Council was notan agency of the Government and was, therefore, not an 'authority.'"

53. In Managing Director, Uttar Pradesh Warehosing Corpration v. Vijay Narayan Vajpayee, (1980) 2 SCR 773 : (AIR 1980 SC 840) an employee of the corporation successfully challenged his dismissal from service. The appellant corporation was estadlished under the Agricultural Produce Development and warehousing(Corporation Act, 1956, and was deemed to be a Warehousing Corporation for a State under the warehousing Corporation Act, 1962. In his concurring judgment Chinnappa Reddy, J., said (at page 784 of SCR) :

"I find it very hard indeed to discover any distinction, on principle bet-

eport No. 55, p. 31

D.P. Madon
Judge
Supreme Court of India

:en a person directly under the emplo-
nent of the Government and a person
der the employment of an agency or
strumentality of the Government or a
orporation, set up under a statute or
corporated but wholly owned by the
overnment. It is self evident and
te to say that the function of the State
s long since ceased to be confined to
preservation of the public peace, the
action of taxes and the defence of its
ontiers. It is now the function of the
ate to secure 'social, economic and
litical justice', to preserve liberty of
ought, expression, belief, faith and
rship', and to ensure 'equality of
tus and of opportunity"'.

(Emphasis supplied)

54. In Ajay Hasia v. Khalid Mujib
hravardi, (1981) 2 SCR 79 : AIR
81 SC 487) the Regional Engin-
ring College which was established
d administered and managed by a
ciety registered under the Jammu and
shmir Registration of Societies Act
98, was held to be "the State" within
meaning of Art 12. In that
e the Court said (at d. 94 of
R):

"It is undoubtedly true that the
rporation is a distinct juristic entity
h a corporate structure of its own and
carries on its functions on business
nciples with a certain amount of aut-
omy which is necessary as well as
ful from the point of view of effective
siness management, but behind the
mal ownership which is cast in corpo-
e mould, the reality is very much
deeply pervasive presence of the Government. It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government. Now it is obvious that if a corporation is an instrumentality or agency of the Government, it must be subject to the same limitations in the field of constitutional law, as the Government itself, though in the eve of the law it would be a distinct and independent legal entity. If the Government acting through its officers is subject to certain constitutional limitations, it must follow a fortiorari that the Government acting through the instrumentality or agency of a corporation should equally be subject to the same limitations."

(Emphasis supplied)

After referring to various authorities, the Court summarized the relevant tests which are to be gathered from the International Airport Authority of India's case, (AIR 1979 SC 1628) as follows (at pages 96-7 of SCR):

"(1) 'One thing is clear that if the entire share capital of the corporation is held by Government it would go along way towards indicating that the Corporation is an instrumentality or agency of Government."

(2) 'where the financial assistance of the State is so much as to meet almost

entire expenditure of the corporation it would afford some indication of the corporation being impregnated with governmental character.'

(3) 'It may also be a relevant factor ... ... whether the corporation enjoys monopoly status which is the State conferred or State protected.'

(4) 'Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.'

(5) 'If the functions of the corporation are of public importance and closely related to governmental functions it would be a relevant factor in classifying the Corporation as an instrumentality or agency of Government,,

55. The right, title and interest of the Burmah Shell Oil Storage and Distributing Company of India Limited in relation to its undertakings in India were transferred to and vested in the Central Government under S. 3 of the Burmah Shell (Acquisition of Undertakings in India) Act, 1975. Thereafter under S. 7 of the said Act, the right, title, interest and liabilities of the said company which had become vested in the Central Government, instead of continuing so to vest in it, were directed to be vested in a Government Company as defined by S. 617 of the Companies Act, 1956, namely, Bharat Petroleum. In Som Prakash Rekhi v. Union of India, (1981) 2 SCR 111 : (AIR 1981 SC 212) this Court held that Bharat Petroleum fell within the meaning of the expression "the State" used in Art. 12. The following passage (at page 124-5 of SCR) : from the judgmen in that case is instructive an requires to be reproduced :

"For purposes of the Companie Act, 1956, a government company ha a distinct personality which cannot b be confused with the State Likewise, statutory corporation constituted t carry on a commercial or other activit is for many purposes a distinct juristi entity not drowend in the sea of State although, in substance, its existence ma be but a projection of the State. Wha we wise to emphasise is that merely be cause a company or other legal perso has functional and jural individualit for certain purposes and in certain area of law, it does not necessarily follo that for the effective enforcement o fundamental rights under our constitutional scheme, we should not sca the real character of that entity; and i it is found to be a mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State constitutional lawyers must not blink a these facts and frustrate the enforcement of fundamental rights despite the inclusive definition of Art. 12 that any authority controlled by the Government cf India is itself State. Law has many dimensions and fundamental facts must govern the applicability of fundamental rights in a given situation."

(Emphasis supplied)

56. At the first blush it may appear that the case of S.S. Dhanoa v. Municipal Corpyrrtion, Delhi, (1981)

port No. 55, p. 33

D. P. Madon
Judge
Supreme Court of India

C 431 runs counter to the trend
in the authorities cited above but
a closer scrutiny it turns out not
e so. The fact in that case were
t the Co-operative Store Limited,
ich was a society registered under
Bombay Co-operative Societies Act
5, had established and was manage-
Super Bazars at different places in-
ding at Connaught place in New
lhi. Under S. 23 of the said Aet.
society was a body corporate by
name under which it was registered
h perpetual succession and a com-
n seal. The Super Bazars were not
ned by the Central Government but
re owned and managed by the said
ciety, though pursuant to an agree-
nt executed between the said soci-
and the Union of India., the Cent-
Government had advanced a loan
rupees forty lakhs to the said
ciety for establishing and managing
per Bazars and it also held more
an ninety-seven per cent of the
ares of the said society. The ap-
llant who was a member of the In-
an Administrative Service was sent
deputation as the General Manager
the Super Bazar at Connaught
ace. He along with other officials
the Super Bazar was prosecuted un-
r the Prevention of Food Adulterat-
n Act, 1954. He raised a preliminary
jection before the Metropolitan
agistrate, Delhi, before whom he
as summoned to appear that no
gnizance of the alleged offence could
taken by him for want of sanction
nder S. 197 of the Code of Criminal
Procedue, 1973. On his contention being rejected, he appealed to this Court. Under the said section 197, when any person who is or was inter-aliea public servant not removable from his office save by or with the sanction of Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court is to take cognizance of such offence except with the previous sanction in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employvd, in connection with the affairs of the Union or of the Central Government. As stated in the opening paragraph of the judgment in the said case the question before the Court was whether the appellant was a public servant within the meaning of Clause Twelfth of S. 21 of the Indian Penal Code for purposes of Section 197 of the Code of Criminal Procedure. The relevant provisions of Clause Twelfth of S. 21 are as follows :

"21. Public servant –

The wards 'public servant' denote a person falling under any of the descriptions hereinafter following, namely :—

X X X

Twelfth—Every person–

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government :

(b) in the service or pay of a local

authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in S 617 of the Companies Act, 1956."

The Court pointed out that Clause Twelfth did not use the words "body corporate" and, therefore, the question was whether the expression "corporation" contained therein taken in collecation of the words "established by or under a Central or Provincial or State Act" would bring within its sweep a co-operative society. The Court said (at page 437 of SCR) :

> "In our opinion, the expression 'corporation, must, in the context, mean a corporation created by the legislature and not a body or society brought into existence by an act of a group of individuals. A co-operative society is therefore, not a corporation established by or under an Act of the Central or state legislature."

The Court then proceeded to point out that a corporation is an artificial being created by law. having a legal entity entirely separate and distinct from the individuals who compose it, with the capacity of continuous existence and succession. The Court held that corporations established by or under an Act of Legislature can only mean a body corporate which owes its existence, and not merely its corporate status, to the Act. An association of persons constituting themselves into a company under the Companies Act or a society under the Societies Registration Act owes its existence not to the Act of Legislature but to acts of parties, though it may owe its status as a body corporate to a Act of Legislature. The observatio of the Court in that case with respe to companies were not intended by it apply to Government companies as d fined in S 617 of the Companies Ac 1956, for by the express terms of su clause (b) of Clause Twelfth of S. 21 the Indian Penal Code every person i the service or pay of a Governmen company as defined in S. 617 of th Companies Act. 1956, is a public servan The second part of the question whic the Court was called upon to decid in that case was whether the appellan can be said to be a person who wa employed in connection with the affair of the Union. The Court held tha the Super Bazar was not an instrumen altity of the State and, therefore, it cou not be said that the appellant was emp loyed in connection with the affairs o the Union within the meaning of th S. 197 of the Code of Criminal Proce dure. This observation was again mad with reference to the argument that th appellant was employed in connectio with the affairs of the Union. He undo ubtedly was not employed in connectio with the affairs of the Union just as person employed in a corporation is no and cannot be said to be holding a civi post under the Union or a State as hel by this Court in S. L. Agarwal v. General Manager Hindustan Steel Ltd , (AI 1970 SC 1150). In S. S. Dhano's cas (AIR 1981 SC 1395) the Court was no called upon to decide and did not decide whether a Government compan was an instrumentality or agency of the State for the purposes of Part III an

V of the Constitution and thus, "the State" within the meaning of that expression as used in Art. 12 of the Constitution.

57. The Indian Statistical Institute is a society registered under the Societies Registration Act, 1860; and is governed by the Indian statistical Institute Act, 1959, under which its control completely vests in the Union of India. The society is also wholly financed by the Union of India. In B. S Minhas v. Indian Statistical Institute, (1983) 4 SCC 582 :(AIR 1984 SC 363) this Court, following Ajay Hasia's case (AIR 1981 SC 487), held that the said society was an "authority" within the meaning of Art 12 and hence a writ petition under Art 32 filed against it was competent and maintainble. In Manmohan Singh Jaitla v. Commr., Union Territory of Chandigarh, (1984) Supp SCC 540 : (AIR 1985 SC 364) this Court once again following Aiay Hasia's Case held that an aided school which received a Government grant of ninety-five per cent was an "authority" within the meaning of Art. 12 and, therefore, amenable to the Writ Jurisdiction both of this Court and the High Court.

58. In Workmen of Hindustan Steel Ltd, v. Hindustan Steel Ltd , (1984) Supp SCC 554, 560 : (AIR 1985 SC 251, the Court held that the Hindustan Steel Ltd. was a public sector undertaking and, therefore was "other authority" within the meaning of that expression in Art 12.

59. In P. K. Ramachndra Iyer v. Union of India, (1984) 2 SCC 141, once again following Ajay Hasia's case (AIR 1981 SC 487), the Court held that the Indian Council of Agricultural Research which was a society registered under the Societies Registration Act was an instrumentality of the State falling under the expression" other authority" within the meaning of Art 12. The said Council was wholly financed by the Government. Its budget was voted upon as part of the expenses incurred in the Ministry of Agriculture. The control of the Government of India permeated through all its activities. Since its inception, it was set up to carry out the recommendations of the Royal Commission on Agriculture. According to this Court, these facts were sufficient to make the said Council an instrumentality of the State.

60. In A.L. Kalra v. Project and Equipment Corporation of India Ltd. (1984) 3 SCC 316, 319 325 the said Corporation was held to be an instrumentality of the Central Government and hence falling within Art. 12. The Project and Equipment Corporation of India Ltd. was a wholly owned subsitdiary company of the State Trading Corporation but was separated in 1976 and thereafter fnnctioned as a Government of India undertaking. The finding that it was an instrumentality of the Central Government was, however, based upon concession made by the said Corporation.

61. In West Bengal State Electricity Board v. Desh Bandhu Ghosh, (1985) 3 SCC 116 the West Bengal State Electricity Board was held to be an instrumentality of the State.

62. As pointed out earlier, the Corporation which is the First Appellant in these Appeals is not only a Government company as defined in S. 617 of the Companies Act, 1956, but is wholly owned by three Governments jointly. It is financed entirely by these three Governments and is completely under the control of the Central Government, and is managed by the Chairman and Board of Directors appointed by the Central Government and temovable by it. In every respect it is thus a veil behind which the Central Government operates through the instrumentality of a Government company. The activities carried on by the Corporation are of vital national importance. The Fifth Five Year Plan 1974-79 states that the "outlay of Rs. 14.73 crores for the next two years includes development of Rajabagan Dockyard and operation of the Centval Inland Water Transport Corporaton and operation of river services on the Ganga; According to the Sixth Five Year Plan, 1980-85, inland water transport is recognized as the cheapest mode of transport for certain kinds of commodities provided the points of origin and destination are both located on the water front, that it one of the most energy efficient modes of transport and has considerable potetial in limited areas which have a net-work of waterways. This plan further emphasises that in the North-Eastern Region where other transport infrastructure is severely lacking and more expensive, inland water transport has an additional importance as an instrument of development. The said plan goes on to state "In the Central Sector, an outlay of Rs. 45 crores has been made for IWT. The most important programme relates to the investment proposal of Central Inland Water Transport Corporation (CIWTC)". The Annual Plan 1984-85 of the Government of India Planning Commission states as follows in paragraph 10.23:

"Inland Water Transport.

Against the approved outlay of Rs. 12 crores in 1983-84, the revised expenditure in the Central Sector is estmated at Rs. 10.40 crores. Bulk of the allocation was for the scheme of Central Inland Water Transport Corporation (CIWTC) for acquisition of vessels, development of Rajabagan Dockyard, creation of infrastruatural facilities etc."

The Annual Report 1984-85 of the Government of India, Ministry of Shipping and Transport states in paragraph 6.1.2 as follows :

"The Inland water Transport Directorate is an attached office of this Ministry headed by a Chief Engineer-cum-Administrator. It has a complement of technical officers who are charged with the responsibility for planning of techno-economic studies on waterways and conducting hydrographic surveys. The Directorate has a Regional office at Patna. Two sub-offices of this Regional office have also been sanctioned. One of the sub-offices has been set up at Gauhati and arrangements are under

to set up the other at Varanasi. The
istry has also under its control a
lic sector undertaking namely, the
tral Inland Water Transport Corpo-
on which is the only major company
nland water transport in the coun-
"

(Emphasis supplied)

As shown by the Statement of Ob-
s and Reasons to the Legislative
, which when enacted became the
tional Waterway (Allahabad-Halda
etch of the Ganga-Bhagirathi-Hoog-
River) Act, 1982 (Act No 49 of
2), published in the Gazette of India
raordinary, Part II. S. 2, dated May
1982, at page 15, the Central Govern-
nt had set up various committees in
w of the advantages in the mode of
and water trasport such as its low
t of transport, energy efficiency,
eration of employment among wea-
sections of the community and less
lution. These committees had reco-
nended that the Central Government
uld, declare certain waterways as
ional waterways and assume respon-
ility for their development. A begin-
g in respect of this matter was thus
de by the enactment of the said Act
. 49 of 1982. Under the said stretch
s declared to be a national waterway
l it was the responsibility of the Cen-
l Government to regulate and develop
s national waterway and to secure its
cient utilization for shipping and
vigation. In the Demands for Grant
the Ministry of Shipping and Trans-
rt 1985-86 additional provision was
de for overall increase in Budget
Estimates 1985-86 mainly for equity participation /investment in the Corp a ration. The activities carried on by the Corporation were thus described in the said Demands for Grant :

> "Central Inland Water Transport Corporation.—CIWTC runs river services between Calcutta and Assam and Calcutta and Bangladesh. It undertakes movement of oil from Haldia to Budge-Budge/Paharpur for the Indian Oil Corporation. It also undertakes lighterage stevedoring operations, ship building, ship repairing and other engineering, services. To meet cash losses over riverine and engineering operations construction of vessels and for purchase of machivery /equipnmet etc, budget estimates 1985-86 provide Rs. 13.50 crores for loan and Rs. 15.41 crores for equity investment in the Corporation."

Last year Parliament passed the Inland. Waterways Authority of India Act, 1985. This Act received the assent of the President on December 30, 1985. Under this Act, an Authority called the Inland Waterways Authority of India is to be consituted and it is to be a body corporate by the name aforesaid, having perpetual succeession and a common seal, with power, subject to the provisions of the said Act, to acquire hold and dispose of property, both movable and immovable and to contract and to sue and be sued by the said name. It is to consist of a Chairman a Vice-Chairman' and other persons not exceeding five. The Chairman, Vice Chairman and other persons are to be appointed by the Central Government

The term of office and other conditions of service of the members of the Authority are to be prescribed by the rules. The Central Government has also the power to remove any member of the Authority or to suspend him pending inquiry against him. Under the said Act, the Authority is, in the discharge of its functions and duties to be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time.

63. It may be mentioned that neither the said Act nor Act No. 49 of 1982 appears to have been yet brought into force.

64. There can thus be no doubt that the Corporation is a Government undertaking in the public sector. The Corporation itself has considered that it is a Government of India undertaking The complete heading of the said Rules is "Central Inland water Transport Corporation Limited (A Government of India Undertaking) Service, Discipline & Appeal Rules, 1979".

65. In the face of so much evidence it is ridiculous to describe the Corporation as a trading company as the Appellants have attempted to do. What has been set out above is move than sufficient to show that the activities of the Corporation are of great importance to public interest, concern and welfare, and are activities of the nature carried on by a modern State and particularly a medern, Welfare State.

66. It was, however, submitted on behalf of the Appellants that even though the cases, out of those referred to
above, upon which the Appellants ha
relied upon were either distinguishab
or inapplicable for determining t
question whether a Government com
any was "the State" or not, t
case of A. L. Kalra v. Project and Equ
pment Corporation of India Ltd (AI
1984 SC 1361), relied upon by the Re
pondents was based upon a concessio
and there was thus no direct authori
on the point in issue. It was furth
submitted that all the other cases i
which various bodies were held to
"the State" Art. 12 were those whic
concerned either a statutory authori
or a corporation established by a statu

67. It is true that the decision i
A. L. Kalra v. Project and Equipme
Corporation of India Ltd., (AIR 198
SC 1367) was based upon a concessio
made by the respondent corporatio
but the case of Workmen of Hindusta
Steel Ltd. v. Hindustan Steel Ltd
(AIR 1985 SC 251) was that of a Gove
nment company for Hindustan Ste
Limited is a Government company
defined by S. 617 of the Companies A
as pointed out in Gurugobinda Basu
Sankari Prasad Ghosal, (1964) 4 SC
311, 315. The case of the Workmen
Hindustan Steel Ltd. related to a ques
ion whether a disciplinary inquiry wa
validly dispensed with under Standin
Order No. 32 of the Hindustan Ste
Limited. Under that Standing Ord
where a woman had been convicte
for a criminal offence in a Court of la
or where the General Manager wa
satisfied, for reasons to be recorded i
writing, that it was inexpedient or ag

st the interest of security to continue employe the workman, the workman ay be removed or dismissed from rvice without following the procedure r holding a disciplinary inquiry laid own in Standing Order No. 31. The der of removal from service of the ncerned workman did not set out any ason for the satisfaction arrived at by e disciplinary authority but merely ated that such authority was satisfied at it was no longer expedient to nploy the particular workman any rther and the order then proceeded to move him form the service of the company. In these circumstances, this ourt held that the order of removal om service was bad in law. In the ourse of its judgment, this Coure observed as follows of 1984 Suppl SCC.

"It is time for such a public ctor undertaking as Hindustan Steel td. to recast SO. 32 and to bring in tune with the philosophy of the onstitution failing which it being other thority and therefore a State under rt. 12 in an appropriate proceeding, e vires of SO. will have to be examined. It is not necessary to do so the present case because even on e terms of SO. 32 the order made the General Manager is unsustainble."

The only reason given by the Court r holding that Hindustan Steel Liited was "other authority" and therefore "the State" under Art. 12 was e fact that it was a public sector ndertaking. In the entire judgment there is no other discussion on this point except what is stated in the passage quoted above. Thus, to the extent that there is no authority of this Court in which the question, namely, whether a Government company is "the State', within the meaning of Art. 12 has been discussed and decided the above submission is correct.

68. Does this, therefore, make any difference ? There is a basic fallacy vitiating the above submission. That fallacy lies in the assumption which that submission makes that merely because a point has not fallen for decision by the Court, it should, therefore not be decided at any time. Were this assumption true, the law would have remained static and would have never advanced the whole process of judicial interpretation lies in extending or applying by analogy the ratio decidendi of an earlier case to a subsequent case which differs from it in certain essentials, so as to make the principle laid down in the earlier case fit in with the new set of circumstances. The sequitur of the above assumption would be that the Court should tell the suitor that there is no precedent governing his case and, therefore, it cannot give him any relief. This would be to do gross injustice. Had this not been done the law would have never advancad. For instance. had Rylands v. Fletcher (1888) 3 HL 330 not been decided in the way in which it was, an owner or occubire of land could with impunity have brought and kept on his land anything

likely to do mischief if it escaped and would have himself escaped all liability for the damage caused by such escape if he had not been negligent. Similary, but for Donoghue v. Stevenson (1932) AC 562 manufacturers would have been immune from liability to the ultimate consumers and users of their products.

69. What is the position before. us? It is only one case decided on a concession and another based upon an assumption that a Government company is "the State" under Art 12? That is the position in fact but not in substancc. As we have seen, authorities constituted under. and corporations established by, statutes have been held to be instrumentalities and agencies of Government in a long catena of decisions of this Court. The obseravations in several of these decisions, which have been emphasised by us in the passages extracted from the judgments in those cases, are general in their natural and take in their sweep all instrumentalities and agencies of the State, whatever be the form which such instrumentality or agency may have assumed. Particularly relevant in this connection are the observations of Mathew, J., in Sukhdev Singn v. Bhagatram Sardar Singh Reghuvanshi, (AIR 1975 SC 1331) of Bhagwati, J., in the International Airport Authority's case, (AIR 1979 SC 1628) and Ajay Hasia's case, AIR 1981 SC 487). and of Chinnappa Reddy. J., in Uttar Pradesh Warehousing Corporation's case (AIR 1980 SC 40), If there is an instrumentality of agency of the State which has assumed the garb of a Government Company as defined in S. 617 of the Companies Act. it does not follow that is thereby ceases to be as instrumentality or agency of the State. For the purposes of Art 12 one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State. The Corporation, which is the Appellant in these two Appeals before us, squarely falls within these observations and it also satisfies the various tests which have been laid down. Merely because it has so far not the monopoly of inland water transportation is not sufficient to divest it of its character of an instrumentality or agency of the State. It is nothing but the Government, operating behind a corporate veil, carrying out a governmental activity and governmental functions of vital public importance. There can thus be no doubt that the Corporation is "the State" within the meaning of Art. 12 of the Constitution.

70. We now turn to the second question which falls for determine these namely Appeals, whether an unconscionable term in a contract of employment entered into with the Corporation, which is "the State" within the meaning of the expression in Art. 12, as being violative of Art. 14 What is challenged under head this is clause (i) of Rule 9 of the said Rules. This challenge levelled by the Respondent in each of these two Appeals succeeded in the High Court.

71. The first point which falls for ideration on this part of the case is her Rule 9 (i) is unconscionable. rder to ascertain this, we must first ine the facts leading to the making e said Rules and then the setting in h Rule 9 (i) occurs. To recapitulate ly, each of the contesting Respond- was in the service of the Rivers n Navigation Company Limited. r services were taken over by the poration after the Scheme of ngement was sanctioned by the utta High Court. Under the said me of Arrangement, if their services not been taken over, they would been entitled to compensation ble to them, either under the strial Disputes Act, 1947, or other- legally admissible, by the said pany, and the Government of India to provide to the said company the unt of such compensation. Under letters of appointment issued to e Respondents, the age of superann- on was fifty-five. Thereafter, Service s were framed by the Corporation 970 which were replaced in 1979 by rules namely, the said Rules. The Rules did not apply to employees red by the Industrial Employment nding orders) Act, 1946, that is, to kmen or to those in respcet of whom Board of Directors had issued sepa- orders. At all relevant times, these pondents were employed mainly in a agerial capacity. No separate orders e issued by the Board of Directors neir case. These Respondents were, efore admittedly governed by the said Rules. Under Rule 10 of the said Rules, they were to retire from the service of the Corporation on completion of the age of fifty-eight years though in exceptional cases and in the interest of the Corporation an extension might have been granted to them with the prior approval of the Chairman-cum-Managing Director and the Board of Directors of the Corporation. The said Rules, however, provide four different modes in which the services of the Respondents could have been terminated earlier than the age of superannuation, namely the completion of the age of fifty-eight years. These modes are those provided in Rule 9 (i), Rule 9 (ii), sub-clause (iv) of clause (b) of Rule 36 read with Rule 38, and Rule 37. Of these four modes, the first two apply to permanent employees and the other two apply to all employees. Rule 6 classifies employees as either Permanent or Probationery or Temporary or Casual or Trainee. Clause (i) of Rule 6 defines the expression "permanent employees" as meaning employee whose services have been confirmed in writing according to the Recruitment and promotion Rules". Under Rule 9 (i) which has been extracted above, the employment of a permanent employee is to be subject to termination on three months' notice in writing on either side. If the Corporation gives such a notice of termination, it may pay to the employee the equivalent of three months' basic pay and dearness allowance, if any, in lieu of notice, and

where a permanent employee terminates the employment without giving due notice, the Corporation may deduct a like amount from the amount due or payable to the employee. Under Rule 11, an employee who wishes to leave the service of the Corporation by resigning therefrom, is to give to the Corporation the same notice as the Corporation is required to give to him under Rule 9, that is, a three months' notice in writing Under Rule 9 (ii), the services of a permanent employee can be terminated on the ground of "Services no longer required in the interest of the Company" (that is, the Corporation). In such a case a permanent employee whose service is terminated under this clause is to be paid fifteen days' basic pay and dearness allowance for each completed year of continuous service in the Corporation and he is also to be entitled to encashment of leave to his credit. Rule 36 prescribes the penalties which can be imposed, "for good and sufficient reasons and as hereinafter provided" in the said Rules, on an employee for his misconduct. Clause (a) of Rule 36 sets out the minor penalties and clause (b) of Rule 36 sets out the major penalties. Under sub-clause (iv) of clause (b) of Rule 36, dismissal from service is a major penalty. None of the major penalties including the penalty of dismissal is to be imposed except after holding an inquiry in accordance with the provisions of Rule 38 and until after the inquiring authority, where it is not itself the disciplinary authority, has forwarded to the disciplinary authority the records of
the inquiry together with its repor
and the disciplinary authority h
taken its decision as provided in Ru
39. Rule 40 prescribes the procedu
to be followed in imposing minor pe
alties. Under Rule 43, notwithstan
ing anything contained in Rule 3
39 or 40, the disciplinary authority ma
dispense with the disciplinary inqui
in the three cases set out in Rule
and impose upon an employee eith
a major or minor penalty. We ha
reproduced Rule 43 earlier. Rule 4
provides for an appeal against an ord
imposing any of the penalties specifi
in Rule 36. Under Rule 37, the Co
poration has the right to terminate t
service of any employee at any time wit
out any notice if the employee is fou
guilty of any insubordination
other misconduct or of any brea
of any rules paitaining to service
conduct or non-performance of h
duties. The said Rules do not requi
that any disciplinary inquiry should
held before terminating an employee
service under Rule 37.

72. Each of the contesting Resp
ndents in these Appeals was asked
submit his written explanation to t
various allegations made against hi
Ganguly, the First Respondent
Civil Appeal No. 4412 of 1985, ga
a detailed reply to the said show cau
notice Sengupta, the First Responde
in Civil Appeal No. 4413 of 1985, d
nied the charges made against him a
asked for inspection of the documen
and copies of statements of witness
mentioned in the charge-sheet serv

pon him to enable him to file his written
tatement. Without holding any inquiry
nto the allegations made against them,
he services of each of them were termi-
ated by the said letter dated February
6, 1983, under Rule 9 (i). The action
vas not taken either under Rule 36 or
ule 37 nor was either of them dismissed
fter applying to his case Rule 43 and
lispensing with the disciplinary inquiry.

72A. It was submitted on behalf
f the Appellants that there was noth-
ng unconscionable about Rule 9 (i),
hat Rule 9 (i) was not a nudum pactum
or it was supported by mutuality in
s much as it conferred an equal right
ipon both parties to terminate the con-
ract of employment, that the grounds
vhich render an agreement void and
inenforceable are set out in the
ndian Contract Act, 1872 (Act No. IX
of 1872), that unconscionability was
ot mentioned in the Indian Contract
Act as one of the grounds which invali-
lates an agreement, that the power
conferred by Rule 9 (i) was necessary
or the proper functioning of the admi-
istration of the Corporation, that in
he case of the Respondents this power
vas exercised by the Chairman-cum-
Managing Director of the Corporation,
and that a person holding the highest
office in the Corporation was not likely
o abuse the power conferred by Rule
9(i).

73. The submissions, on the other
hand, were that the parties did not stand
on an equal footing and did not enjoy
the same bargaining power, that the
contract contained in the service rules
was one imposed upon these Respondents, that the power conferred by rule 9 (i) was arbitrary and uncanalized as it did not set out any guidelines for the exercise of that power and that even assuming it may not be void as a contract; in any event it offended Art. 14 as it conferred an absolute and arbitrary power upon the Corporation.

74. As the question before us is of the validity of clause (i) of Rule 9, we will refrain from expressing any opinion with respect to the validity of clause (ii) of Rule 9 or Rule 37 or 40 but will confine ourselves only to Rule 9 (i).

75. The said Rules constitute a part of the contract of employment between the Corporation and its employees to whom the said Rules apply, and thus form a part of the contract of employment between the Corporation and each of the two contesting Respondents. The validity of Rule 9 (i) would, therefore, first fall to be tested by the principles of the law of contracts.

76. Under S. 19 of the Contract Act, when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. It is not the case of either of the contesting Respondents that there was any coercion brought to bear upon him or that any fraud or misrepresentation had been practised upon him Under section 19A, when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the

option of the party whose consent was so caused and the Court may set aside any such contract either absolutely or if the party who was entitled to avoid it has received any benefit there-under, upon such terms and conditions as to the Court may seem just. Sub-sec (1) of S. 16 defines "Undue influence" as follows :

> "16. 'Undue influence' defined.—
>
> (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."

The material provisions of sub-sec. (2) S. 16 are as follows :

> "(2) In particular and without prejudice to the generality of the forcgoing principle, a person is deemed to be in position to dominate will the of another—
>
> (a) where he holds a real or apparent authority over the other.........."

We need not trouble ourselves with the other sections of the Contract Act except Ss.23 and 24. Section 23 states that the consideration or object of an agreement is lawful unless inter alia the Court regards it as opposed to public policy. This section further provides that every agreement of which the object or consideration is unlawful is void. Under S. 24, if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void. The agreement is, however, not always void in its entirety for it well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The general rule was stated by willes, J, in Pickering v. Ilfracombe Ry. Co. (1868) 3 CP 235 (at page 250) as follows :

> "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good".

77. Under which head would an unconscionable bargain fall ? If it falls under the head of undue influnce, it would be voidable but if it falls under the head of being opposed to public policy, it would be void. No case of the type before us appears to have fallen for decision under the law of contracts before any court in India nor has any case on all fours of a Court in any other country been pointed out to us. The word "unconscionable" is defined in the Shorter Oxford English Dictionary. Third Edition, Volume II, page 2288, when used with reference to actions, etc. as "showing no regard for conscience; irreconcilable with what is right or reasonable". An unconscionable bargain would, therefore, be one which is irreco-

able with what is right or reason-
e.

78. Although certain types of con-
ts were illegal or void, as the case
be, at Common Law, for instance,
se contrary to public policy or to
nmit a legal wrong such as a crime or
rt, the general rule was of freedom
contract. This rule was given full
in the nineteenth century on the
und that the parties were the best
ges of their own interests, and if they
ly and voluntarily entered into a con-
t, the only function of the Court was
nforce it. It was conisdered imma-
al that one party was economically
stronger bargaining position than
other; and if such a party introduced
lifications and exceptions to his liab-
y in clauses which are today known
'exemption clauses" and the other
ty accepted them, then full effect
ld be given to what the parties
eed. Equity, however, interfered in
ny cases of harsh or unconscionable
gains, such as in the law relating to
alties, forfeitures, and mortgages.
lso interfered to set aside harsh or
onscionable contracts for salvage
vices rendered to a vessel in distress
unconscionable contracts with expec-
t heirs in which a person, usually a
ney-lender, gave ready cash to the
r in return for the property which he
ects to inherit and thus to get such
perty at a gross undervalue. It also
erfered with harsh or unconscionable
tracts entered into with poor and
orant persons who had not received
ependent advice (See Chitty on Contracts, Twenty-fifth Edition, Volume I, paragraphs 4 and 516).

79. Legislation has also interfered in many cases to prevent one party to a contract from taking undue or unfair advantage of the other. Instances of this type of legislation are usury laws, debt relief laws and laws regulating the hours of work and conditions of service of workmen and their unfair discharge from service, and control orders directing a party to sell a particular essential commodity to another.

80. In this connection, it is useful to note what Chitty has to say about the old ideas of freedom of contract in modern times. The relevant passages are to be found in Chitty on Contracts. Twenty-fifth Editon, Volume I, in paragraph 4, and are as follows:

"These ideas have to a large extent lost their appeal today. 'Freedom of contract,' it has been said, 'is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large. Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered many contracts entered into by public utility undertakings and others take the form of a set of terms fixed in advance by one party and not open to discussion by ths other. These are called 'contracts dadhesion' by French lawyers. Traders frequently contract, not on individually negotiated terms, but on those contained in a standard form of contract settled by a trade association. And the terms of an employee's contract of employment may be determined by agreement between his trade union and his employer, or by a statutory scheme of employment. Such transactions are nevertheless contracts notwithstandidg that freedom of contract is to a great extent laeking.

Where freedom of contract is absent, the disadvantages to consumers or members of the public have to some extent been offset by administrative procedures for consultation and by legislation. Many statutes introduce terms into contracts which the parties are forbidden to exclude, or declare that certain provisions in a contract shall be void. And the Courts have developed a number of devices for refusing to implement exemption clauses by the economically stronger party on the weaker, although they have not recognised in themselves any general power (except by statute) to declare broadly that an exemption clause will not be enforced unless it is reasonable. Again, more recently, certain of the judges appear to have recognised the possibility of relief form contractual obligations on the ground of inequality of bargaining power".

What the French call "contracts dadhesion", the American call "adhesion' contracts" or "cotracts of adhesion". An "adhesion contract" is defined in Black's Law Dictionary, Fifth Edition, at page 38 as follows:

"Adhesion contract'. Standardized contract form offered to co sumers of goods and services c essentially 'take it or leave it' bas without affording consumer realist opportunity to bargain and under suc conditions that consumer cannot obtai desired product or services excep by acquiescing in form contrac Distinctive feature of adhesio contract is that weaker party ha no realistic choice as to its terms. N every such contract is unconscionable

81. The position under the Ame ican Law is stated in "Reinstateme of the Law-Second" as adopted an promulgated by the American La Institute, Volume II which deals wit the law of contracts, in section 208 page 107' as follows:

"S. 208. Unconscionable Contra or Term".

"If a contract or term therereof i unconscionable at the time the contrac is made a Court may refuse to enforc the contract, or may enforce the remain der of the contract without the uncons ionable term, or may so limit the appl cation of any unconscionabe term as t avoid any unconscionable result."

In the Comments given under tha section it is stated at page 107:

"Like the obligation of good fait and fair dealing (S 205), the policy agai nst unconscionable contracts or term applies to a wide variety of types of con duct. The determination that a con tract or term is or is not unconscion able is made in the light of its setting purpose and effect. Relevant factor

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lude weaknesses in the contracting cess like those involved in more cific rules as to contractual capacity ud and other invalidating causes; the icy also overlaps with rules which der particular bargains or terms nforceable on grounds of public icy. Policing against unconscionable tracts or terms has sometime been omplished by adverse construction language, by manipulation of the es of offer and acceptance or by erminations that the clause is con- y to public policy or to the domin- nt purpose of the contract'. Uni- m Commercial Code S. 2–302 Com- nt 1....

A bargain is not unconscionable rely because the parties to it are un- al in bargaining postion, nor even ause the inequality results in an cation of risks to the weaker party. gross inequality of bargaining ver, together with terms unreaso- ly favourable to the stronger party y confirm indications that the tran- tion involved elements of deception compulsion, or may show that the aker party had no meaningful choice real alternative, or did not in fact ent or appear to assent to the un- terms."

(Emphasis supplied)

There is a statute in the United tes ealled the Universal Commercial de which is applicable to contracts ating to sales of goods. Though s statute is inapplicable to con- cts not involving sales of goods, it s proved very influential in, what are called in the United States "non-sales" cases. It has many times been used either by analogy or because it was felt to embody a general accepted social attitude of fairness going beyond its statutory application to sales of goods. In the Reporter's Note to the said section 208, it is stated at page 112;

> "It is to be emphasized that a contract af adhesion is not unconscionable per se, and that all unconscionable contracts are not contracts of adhesion. Nontheless, the more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability."

(Emphasis supplied)

The position has been thus summed up by John R. Peden in "The law of Unjust Contracts" published by Butterworths in 1982, at pages 28-29 :

> "............Unconscionability represents the end of a cycle commencing with the Aristotelian concept of justice and the Roman law laesio enormis which in turn formed the basis for the medieval church's concept of a just price and condemnation of usury. These philosophies permeated the exercise, during the seventeenth and eighteenth centuries, of the Chancery court's discretionary powers under charge which it upset all kinds of unfair transactions. Subsequently the movement towards economic individualism in the nineteenth century hardened the exercise of these powers by emphasizing the freedom of the parties to make their own contract. While the principle of Pacta-

Sunt Servanda held dominance, the consensual theory still recognised exceptions where one party was overborne by a fiduciary or entered a contract under duress or as the result of fraud. However these exceptions were limited and had to be strictly proved.

It is suggested that the judicial and legislative trend during the last 30 years in both civil and common law jurisdictions has almost brought the wheel full circle. Both Courts and Parliaments have provided greater protection for weaker parties from harsh contracts. In several jurisdictions this included a general power to grant relief from unconscionable contracts, thereby providing a launching point from which the courts have the opportunity to develop a modern doctrine of unconscionability. American decisions on article 2302 of the UCC have already gone some distance into this new arena........

The expression "laesio enormis' used in the above passage refers to "laesio ultra dimidium vel enormis" which in Roman lay meant the injury sustained by one of the parties to an onerous contract when he had been over reached by the other to the extent of more than one-half of the value of the subject-matter, as for exampte, when a vendor had not received half the value of property sold, or the purchaser had paid more than double. value. The maxim "pacta sunt servanda" referred to in the above passage means "contracts are to be kept".

82. It would appear from certa in recent English cases that the Court in that country have also begun t recognize the possibilitiy of an unconscionable bargain whieh could be brought about by economic duress eve between parties who may not in economic terms be situate differently (See for instance, Occidental Worldwid Investment Corpn. v. Skibs A/S Avanti (1976) 1 Lloyd,s Rep. 293, Nort Ocean Shipping Co. Ltd. v. Hyunda Construction Co. Ltd. (1979) QB 70 Pao On v. Lau Yin Long (1980) A 614 and Universe Tankships of Monrovia v. International Transport Worker Federation (1981) ICR 129, relerse in (1982) 2 WLR 803, and the commentary on these cases in Chitty o Contract Twenty-fifty Edition, Volum I; paragraph 416)

83. Another jurisprudential concept of comparatively modern origi which has affected the law of contracts is the theory of "distributive justice". According to this doctrine distributive fairness and justice in th possession of wealth and property ca be achieved not only by taxation bu also by regulatory control of privat and contractual transactions even though this might involve some sacrific of individual liberty. In Lingapp Pochanna Appelwar v. State of Maharashtra, (1985) 1 SCC 479 : (AIR 198 SC 389), this Court, while upholdin the constitutionality of the Maharashtra Restoration of Lands to Schedule

oes Act, 1974, said.

"The present legislation is a typical
stration of the concept of distribu-
justice, as modern jurisprudents
w it. Legislators, Judges and ad-
istrators are now familiar with the
cept of distributive justice. Our Co-
tution permits and even directs
State to administer what may be
med 'distributive justice'. The con-
t of distributive justice in the sph-
of law-making connotes, inter alia,
removal of economic inequalities
rectifying the injustice resulting
n dealings or transactions between
quals in society. Law should be
d as an instrument of distributive
ice to achieve a fair division of
lth among the members of soci-
based upon the principle : 'From
h according to his capacity, to
h according to his need'. Dist-
itive justice comprehends more
n achieving lessening of inequali-
by differential taxation, giving
t relief or distribution of property
ned by one to many who have
e by imposing ceiling on holdings,
h agricultural and urban, or by
ect regulation of contractual trans-
ions by forbidding certain transac-
ns and, perhaps, by repuiring others.
also means that those who have
n deprived of their properties by
conscionable bargains should be res-
ed their property All such laws
y take the form of forced redistri-
ion of wealth as a means of achie-
g a fair division of material reso-
es among the members of society
or there may be legislative control of unfair agreements."

(Emphasis supplied)

When our Constitution states that it is being enacted in order to give to all the citizens of India "JUSTICE' social, economic and political", when clause (1) of Art 38 of the Constitution directs the State to strive to promote the welfare of the people by securing and protecting as effectively as it may be social order in which social, economic and political justice shall inform all the institutions of the national life, when clause (2) of Art. 38 directs State, in particular, to minimize the inequalities in income, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations, and when Art. 39 directs the State that it shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment and that there should be equal pay for equal work for both men and women, it is the doctrine of distributive justice which is speaking through these words of the Constitution.

84. Yet another theory which has made its emergency in recent years in the sphere of the law of contracts is the test of reasonableness or fairness of a clause in a contract where there is inequality of bargaining power. Lord Denn-

ing, M. R., appears to have been the propounder, and perhaps the originator …… at least in England, of this theory. In Gillespie Brothers & Co Ltd. v. Roy Bowles Transport Ltd., (1973) 1 QB 400. Where the question was whether an indemnity clause in a contract, on its true construction, relieved the indemnified from liability arising to the indemnified from his own negligence, Lord Denning said (at pages 415 6) :

"The time may come when this process of 'construing' the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago :

'there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused' : John Lee & Son (Grantham) Ltd. v. Railway Executive (1949) 2 All ER 581, 584. It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so."

(Emphasis supplied)

In the above case the Court of Appeal negatived the defence of the indemnifier that the indemnity clause did not cover the negligence of the indemnified. It was in Lloyds Bank Ltd. v. Bundy, (1974) 3 All ER 757 that Lord Denning first clearly enunciated his theory of "inequality of bargaining power". He began his discussion on this part of the case by stating

"There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the will. Hitherto those exceptional cases have been treated each as a separate category in itself But I think the time has come when we shoul seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those were there has been inequality of bargaining power, such as to merit the intervention of the Court."

(Emphasis supplied)

He than referred to various categories of cases and ultimately deducted thereform a general principle in these words (at page 765) :

"Gathering all together, I would suggest that through all these instances there runs a single thread They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own orance or infirmity, coupled with ue influences or pressures brought oear on him by or for the benefit of other. When I use the word 'undue' not mean to suggest that the princi- depends on proof of any wrong do- The one who stipulates for an air advantage may be moved solely his own self-interest, unconscious ne distress he is bringing to the other. ve also avoided any reference to the of the one being 'dominated' or ercome' by the other. One who is in emis need may knowingly consent most improbident bargain, solely to eve the straits in which he finds self. Again, I do not mean to gest that every transaction is saved ndepended advice. But the absence may be fatal. With these explanat- s, I hope this principle will be found reconcile the cases."

(Emphasis supplied)

85. Though the House of Lords s not yet appear to have unanim- y accepted this theory, the observat- s of Lord Diplok in A. Schroeder sic Publishing Co Ltd. v. Macaulay rmerly Instone) (1974) 1 WLR 1308 a clear pointer towards this direct- In that case a song writer had ered into an agreeemnt with a music lisher in the standard form whereby publishers engaged the song writer's usive services during the term of the eement: which was five years. der the said agreement, the song er assigned to the publisher the full yright for the whole world in his ical compositions during the said term. By another term of the said agreement, if the total royalties during the term of the agreement exceeded Ponds 5,000 the agreement was to stand automatically extended by a further period of five years. Under the said agreement, the publisher could determine the agreement at any time by one month's written notice but no corresponding right was given to the song writer: Further, while the publisher had the right to assign the agreement, the song writer agreed not to assign his rights without the publisher's prior written consent. The song writer brought an action claiming inter alia, a declaration that the agreement was contrary to public policy and void. Plowman, J., who heard the action granted the declaration which was sought and the Court of Appeal affirmed his judgment. An appeal filed by the publishers against the judgment of the Court of Appeal was dismissed by the House of Lords. The Law Lords held that the said agreement was void as it was in restraint of trade and thus contrary to public policy. In his speech Lord Diplock, however, outlined the theory of reasonablenss or fairness of a bargain. The following observations of his on this part of the case require to be reproduced in extenso:

"My Lords, the contract under consideration in this appeal is one whereby the respondent accepted restrictions upon the way in which he would exploit his earning power as a song writer for the next ten years. Because this can be classified as a contract in restraint of trade the rest-been doing has been to assess the relative dargaining power of the publisher and the song writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to cxact from the song writer promises that were unfairly onerous to him. Your Lordships have not ben concerned to inquire whether the public have in fact been deprived of the fruit of the song writer's talents by reason of the restrictions, nor to assess the likelihood that they would be deprived in the future if the contract were permitted to run its full course.

It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the Court is implementing is not some 19th century economic theory about the benefit to the general public of freedom of trade, but protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable Under the influence of Bentham and of laissex faire the Courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generaally, as they had formerly done to any contract considered to be usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in restraint of trade. If one looks at th reasoning of 19th century judges i cases about contracts in restraint c trade one finds lip service paid to current economic theories, but if one look at what they said in the light of wha they did, one finds that they struc down a bargain if they though it wa nuconscionable as between the partie to it and upheld it if they though tha it was not.

So I would hold that the questio to be answered as respects a contrac in restraint of trade of the kind wit which this appeal is concerned is:

"was the bargain fair?" The test o fairniss is, no doubt, whether the restrictions are both reasonably necessary fo the protection of the legitimate interest of the promisee and commensurate wit the benefits secured to the promiso under the contract. For the purpose o this test all the provisions of the contract must be taken into consideration.

(Emphasis supplied

Lord Diplock than proceeded t point out that there are two kinds o standard forms of contracts. Tht firs is of contracts which contain standar clauses which "have ben settled ove the years by negotiation by representatives of the commercial interests involved and have been widely adopte because experience has shown that the facilitate the conduct of trade". He then proceeded to state, "If fairness o reasonableness were relevant to thei enforceability the fact that they widel used by parties whose bargaining powe is fairly matched would raise a strong

esumption that their terms are fair
d reasonable". Referring to the other
nd of standard form of contract Lord
plock said :

"The same presumption, however,
es not apply to the other kind of
ndard form of contract. This is of
mparatively modern origin. It is the
sult of the concentration of particular
nds of business in relatively few hands.
ne ticket cases in the 19th century
ovide what are probably the first ex-
nples. The terms of this kind of stan-
rd from of contract have not been the
bject of negotiation between the part-
s to it, or approved by any organisa-
on representing the interests of the
eaker party. They have been dictated
that party whose bargaining power
ther exercised alone or in conjunc-
on with others providing similar goods
services, enables him to say :
If you want these goods or services
all, these are the only terms on
hich they are obtainable. Take it
leave it'. To be in a position to
lopt this attitude towards a party
esirous of entering into a contract
obtain goods or services provides
Classic instance of superior bargain-
g power."

(Emphasis Supplied)

86. The observations of Lord De-
ning, M. R., in Lavision v. Patent
eam Carpet Co. Ltd. (1978) 1 QB
, are also useful and require to be
uoted. These observations are as fo
llows :

"In such circumstances as here the Law Commission in 1975 Commission in 1975 recommended that a term which exempts the stronger party from his ordinary common law liability should not be given effect except when it is reasonable; see The Law Commission and the Scottish Law Commission Report, Exemption Clauses, Second Report (1975) (August 5, 1975), Law Com. No. 69 (H. C. 605), pp. 62, 174; and there is a bill now before parliament which gives effect to the test of reasonableness. This is a gratifying piece of law reform : but I do not think we need wait for that bill to by passed into law. You never know what may happen to a bill. Meanwhile the common law has its own principles ready to hand. In Gillespie Bros. & Co. Ltd. v, Roy Bowles Transport Ltd. (1973) 1 QB 400, 416, I suggested that an exemption or limitation Clause should not be given effect if it was unreasonable, or if it would be unreasonable to apply it in the circumstaances of the case. I see no eason why this should not be applied today, at any rate in contracts in standard forms where there is inequality of bargaining power."

87. The Bill referred to by Lord Denning in the above passage, when enacted, became the Unfair Contract Terms Act' 1977. This statute does not apply to all Contracts but only to certain Classes of them. It also does not

apply to contracts entered into before the date on which it came into force, namely, February 1, 1978; but subject to this it applies to liability for any loss or damage which is suffered on or after that date. It strikes at clause excluding or restricting liability in certain classes of contracts and torts and introduces in respect of clauses of this type test of reasonableness and prescribes the guidelines for determining their reasonableness. The detailed provisions of this statute do not concern us but they are worth a study.

88. In Photo Production Ltd. v. Securicor Transport Ltd., (1980) AC 827, a case before the Unfair Contract Terms Act, 1977, was enacted, the House of Lords upheld an exemption clause in a contract on the defendants's printed form containing standard conditions. The decision appears to proceed on the ground that the parties were businessmen and did not possess unequal bargaining power. The House of Lords did not in that case reject the test of reasonableness or fairness of a Clause in a contract where the parties are not equal in bargaining position. On the contrary, the speeches of Lord Wilberforce, Lord Diplock and Lord Scarman would seem to show that the House of Lords in a fit case would accept that test. Lord Wilberforce in his speech, after referring to the Unfair Contract Terms Act, 1977, said :

> "This Act applies to consumer contracts and those based on standard enables exception clauses to b applied with regard to what is ju and reasonable. It is significant tha Parliament refrained from legislatin over the whole field of contract. Afte this Act, in commercial matters gene rally, when the parties are not at un equal bargaining power, and when ris ks are normally borne by insurance not only is the case for judicial inter vention undemonstrated, but there i everything to be said, and this seem to have been Parliament's intention for leaving the parties free to appor tion the risks as they think fit and fo respecting their decision."

Empnasis supplie

Lord Diplock said (at pages 850-51)

> "Since the obligations implied b law in a commercial contract are thos which, by judicial consensus over th years or by Parliament in passing statute, have been regarded as obliga tions which a reasonable businessma would realise that he was acceptin when he entered into a contract of particular kind, the court's view of th reasonableness of any departure from the implied obligations which would b involved in construing the expres words of an exclusion clause in on sense that they are capable of hearin rather than another, is a relevant con sideration in deciding what meanin the words were intended by the part ies to bear."

(Emphasis supplied

Report No. 55, p. 55

Lord Scarman. while agreeing with Lord Wilberforce, described (at page 853) the action out of which the appeal before the House had arisen, as "a commercial dispute between parties well able to took after themselves" and then added, "In such a situation what the parties agreed (expressly or impliedly) is what matters; and the duty of the courts is to construe their contract according to its tenor."

89. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognized, at least in certain areas of the law of contracts, that there can be unreasonableness (or lack of fairness; of one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, section 138 (2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages ... ... which are obviously disproportionate to the performance given in return." The position according to the French law is very much the same.

90. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussion on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Art. 14. This principle is that the courts will not enforce and will, when called upon to do so strike down an unfair and unreasonable contract, or an unfair and unreasouable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of

men. One can only attempt to give some illustration. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however will not apply where the bargaining power of the contraction parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The Court must judge each case on its own facts and circumstances.

91. It is not as if our civil courts have no power under the existing law Under section 31 (1) of the Specific Relief Act, 1963 (Act No. 47 of 1963), any person against whom an instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion so adjudge it and order it to be delivered up and cancelled

92. Is a contract of the type mentioned above to be adjudged voidable or void ? If it was induced by undue influence, then under section 19A of the Indian Contract Act, it would be voidable. It is, however, rarely that contracts of the types to which the principle formulated by us above applies are induced by undue influence as defined by us 16 (1) of the Contract Act even though at times they are between parties one of whom holds a real or apparent authority over the other. In the vast majority of cases, however such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power. Such contracts will not fall within the four corners of the definition of "undue influence" given in section 16 (1). Further, the majority of such contracts are in a standard or prescribed form or consist of a set of rules They are not contracts between individuals contain-

terms meant for those individuals
ne. Contracts in prescribed or
ndard forms or which embody a set
ules as part of the contract are
ered into by the party with superior
gaining power with a large number
persons who have far less bargaining
ver or no bargaining power at all.
h contracts which affect a large
nber of persons or a group or groups
persons, if they are unconscionable,
air and unreasonable, are injurious
he public interest. To say that such
ontract is only voidable would bo to
npel each person with whom the
ty with superior bargaining power
contracted to go to court to have
contract adjudged voidable.
s would only result in multip-
y of litigation which no court should
ourage and would also not be in the
lic interest. Such a contract or such
ause in a contract ought, therefore,
be adjudged void, while the law
ontracts in England is mostly judge-
de, the law of contracts in India is
cted in a statute, namely,the Indian
ntract Act, 1872. In order that such
ontract should be void, it must fall
er one of the relevant sections of the
ian Contract Act. The only relevant
vision in the Indian Contract Act
ch can apply is S.23 when it states
"The consideration or object of an
eement is lawful, unless ... the court
ards it as......opposed to public
cy."

93. The Contract Act does not
ne the expression "public policy" or
posed to public policy". From the
very nature things, the expressions "public policy" "opposed to public policy" or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It cannotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought—"the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the grouud of public policy unless that particular ground had been well established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Driefontein Consolidated Mines, Limited (1902) Ac 484, 500, "public policy is always an unsafe and treacherous ground

for legal decision." That was in the year 1902. Seventy-eight years earlier, Burrough, J., in Richardson v. Mellish (1824) 2 Bing 229, 252 SC 130 ER 294, 303, and (1824-34). All ER Reprint 258, 266, described publicy policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great Taming Bucephalus, he said in Enderby Town Football Club Ltd. v. Football Association Ltd. (1971) Ch 591, 606, "with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law," Volume III, page 55, has said:

"In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them."

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification, practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precident, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive principles enshrined in our Constitution.

94. The normal rule to Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of A Schroeder Music Publishing Co. Ltd. v. Macaulay (1974 1 WLR 1308), however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue, to have it declared void. The case may be different where the purpose ef the contract is illegal or immoral. In Kedar Nath Motani v. Prahlad Rai (1960) 1 SCR 861 : (AIR 1960 SC 213) reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the

nglish and Indian law on the subject, id :

> "The correct position in law, in our oinion, is that what one has to see is hether the illegality goes so much to e root of the matter that the plaintiff nnot bring his action without relying oon the illegal transaction into which e had entered. If the illegality be ivial or venial, as stated by williston id the plaintiff is not required to rest s case upon that illegality, then public olicy demands that the defendant sho- d not be allowed to take advantage of e position. A strict view, of course, ust be taken of the plaintiff's conduct, nd he should not be allowed to circu- vent the illegality by resorting to some bterfuge or be misstating the facts. , however, the matter is clear and the legality is not required to be pleaded proved as part of the cause of action nd the plaintiff recanted before the egal purpose was achieved, then unless be of such a gross nature as to outr- ge the conscience of the Court, the ea of the defendant should not prev- l."

The types of contracts to which the rinciple formulated by us above applies e not contracts which are tainted with legality but are contracts which contain rms which are so unfair and unreason- ole that they shock the conscience of e court. They are opposed to public olicy and require to be adjudged void.

95. We will now test the validity of . 9 (i) by applying to it the principle ormulated above. Each of the contesting Respondents was in the service of the Rivers Steam Navigation Company Limited and on the said Scheme of Arrangement being sanctioned by the Calcutta High Court, he was offiered employment in the Corporation which he had accepted. Even had these Respondents not liked to work for the Corporation, they had not much of a choice because all that they would have got was "all legitimate and legal compensation payable to them either under the Industrial Disputes Act or otherwise legally Admissible". These Respondents were not covered by the Industrial Disputes Act for they were not workmen but were officers of the said company. It is, therefore, difficult to visualize what compensation they would have been entitled to get unless their contract of employment with their previous employers contained any provision in that behalf. So far as the original terms of employment with the Corporation are concerned, they are contained in the letters of appointment issued to the contesting Respondents. These letters of appointment are in a stereotype form. Under these letters of appointment, the Corporation could without any previous notice terminate their service, if the Corporation is satisfied on medical evidence that the employee was unfit and was likely for a considerable time to continue to be unfit for the discharge of his duties. The Corporation could also without any previous notice dismiss either of them, if he was guilty of any insubordination, intemperance or other misconduct, or of any breach of

any rules pertaining to his service or conduct or non-performance of his duties. The above terms are followed by a set of terms under the heading "Other Conditions". One of these terms stated that "You shall be subject to the service rules and regulations including the conduct rules". Undoubtedly, the contesting Respondents accepted appointment with the Corporation upon these terms. They had, however, no real choice before them. Had they not accepted the appointments, they would have at the highest received some compensation which would have been probably meagre and would certainly have exposed themselves to the hazard of findiag another job.

96. It was argued before us on behalf of the contesting Respondents that the term that these Respondents would be subject to the service rules and regulations including the conduct rules, since it came under the heading "Other Conditions" which followed the clauses which related to the termination of service, referred only to service rules and regulations other than those providing for termination of service and, therefore, Rule 9 (i) did not apply to them. It is unnecessary to decide this question in the view which we are inclined to take with respect to the validity of Rule 9 (i).

97. The said Rules as also the earlier rules of 1970 were accepted by the contesting Respondents without demur. Here again they had no real choice before them. They had risen higher in the hierarchy of the Corporation. If they had refused to accept the said Rules it would have resulted in termination of their services and the consequent anxiety, harasment and uncertainty of finding alternative employment.

98. Rule 9 (i) confers upon the Corporation the power to terminate the service of a permanent employee by giving him three months' notice in writing or in lieu thereof to pay him the equivalent of three months' basic pay and dearness allowance. A similar regulation framed by the West Bengal State Electricity Board was described by this Court in West Bengal State Electricity Board v. Desh Bandhu Ghosh, (1985) 3 SCC 116 :

> "…..a naked 'hire and fire' rule, the time for banishing which altogether from employer-employee relationship is fast approaching. Its only parallel is to be found in the Henry VIII clause so familiar to administrative lawyers."

As all lawyers may not be familiar with administrative law, we may as well explain that "the Henry VIII clause" is a provision occasionally found in legislation conferring delegated legislative power, giving the delegate the power to amend the delegating Act in order to dring that Act into full operation or otherwise by Order to remove any difficulty, and at times giving power to modify the provisions of other Acts also. The Committee on Ministers' Powers in its report submitted in 1932 (Cmd. 4060) pointed out that such ɔort No 55, p. 61

D. P. Madon
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ɔrovision had been nicknamed "the
nry VIII clause" because "that king
egarded popularly as the impersona-
n of executive autocracy". The Com-
tee's Report (at page 61) criticised
se clauses as a temptation to slips-
l work in the preparation of bills
l recommended that such provisions
ɔuld be used only where they were
tified before Parliament on compell-
grounds. Legislation enacted by Par-
ment in the United Kingdom after
32 does not show that this recommen-
ion had any particular effect.

99. No after description of Rule
) can be given then to call it "the
nry VIII Clause". It confers ab-
ute and arbitrary power upon the
rporation. It does not even state
o on behalf of the Corporation is
exercise that power. It was submi-
d on behalf of the Appellants that
vould be the Board of Directors.
e impugned letters of termination,
wever, do not refer to any resolution
decision of the Board and even if
y did, it would be irrelevant to the
lidity of Rule 9 (i). There are no
idelines whatever laid down to in-
ate in what circumstances the power
en by Rule 9 (i) is to be exercised
the Corporation. No opportunity
atever of a hearing is at all to be
orded to the permanent employee
ose service is being terminated in
e exercise of this power. It was
ged that the Board of Directors
uld not exercise this power arbi-
rily or capriciously as it consists of
ponsible and highly placed persons.

This submission ignores the fact that however highly placed a person may be, he must necessarily possess human frailties. It also overlooks the well-known saying of Lord Acton, which has now almost become a maxim, in the Appendix to his "Historical Essays and Studies", that "power tends to corrupt, and absolute power corrupts absolutely." As we have pointed out earlier, the said Rules provide for four different modes in which the services of a permanent employee can be terminated earlier than his attaining the age of superannuation, namely R. 9 (1) R. 9 (ii), sub-cl. (iv) of Cl. (b) of R. 36 read with R. 38 and R. 37. Under R. 9 (ii) the termination of service is to be on the ground of "services no longer required in the interest of the Company." Sub-cl. (iv) of Cl. (v) of R. 36 read with R. 38 provides for dismissal on the ground of misconduct. Rule 37 provides for termination of service at any time without any notice if the employee is found guilty of any of the acts mentioned in that Rule. Rule 9 (i) is the only Rule which does not state in what circumstances the power conferred by that Rule is to be exercised. Thus, even where the Corporation could proceed under Rule 36 and dismiss an employee on the ground of misconduct after holding a regular disciplinary inquiry, it is free to resort instead to R. (i) in order to avoid the hustle of an inquiry. Rule 9 (i) thus confers an absolute, arbitrary and unguided power upon the Corporation. It violates one of the two great rules of natural justice—the audi alteram partem rule. It is not only in cases to which Art. 14 applies that the rules of natural justice come into play. As pointed out in Union of India v. Tulsiram Patel, (1985) 3 SCC 398 (at Page 463) : (AIR 1985 SC 1416 at p. 1451). "The principles of natural justice are not the creation of Art. 14. Art. 14 is not their begetter but their constitutional guardian. "That case has traced in some detail the origin and development of the concept of principles of natural justice and of the audi alteram partem rule (at pages 463-480) (of 1985) 3 SCC) : (at pp. 1451-1463 of AIR). They apply in diverse situations and not only to cases of State action. As pointed out by O. Chinnappa Reddy J., in Swadeshi Cotton Mills v. Union of India, (1981) 2 SCR 533. 591 : (AIR 1981 SC 818, 846-47) they are implicit in every decision making function, whether judicial or quasi- judicial or administrative. Undoubtedly, in certain circumstances the principles of natural justice can be modified and in exceptional cases, can even be excluded as pointed out in Tulsiram Patel's case (AIR 1985 SC 1416). Rule 9 (i), however, is not covered by any of the situations which would justify the total exclusion of the audi alteram partem rule.

100. The power conferred by Rule 9 (i) is not only arbitrary but is also discriminatory for it enables the Corporation to discriminate between employee and employer. It can pick up one employee and apply to him Clause (1) of rule 9. It can pick up another employee and apply to him clause (ii) of Rule 9 It can pick up ye another employee and apply to him sub-clause (iv) of clause (b) of Rule 36 read with Rule 38 and to yet another employee it can apbly Rule 37 All this the Corporation can do when the same circumstances exist as would justify the Corporation in holding under Rule 38 a regular disciplinary into the alleged misconduct of the employee Both the contesting Respondents had in fact, been asked to submit their explanation to the charges made against them. Sengupta had been informed that a disciplinary inquiry was proposed to be held in his case. The charges made against both the Respondents were such that a disciplinary inquiry could easily have been held. It was, however, not held but instead resort was had to Rule 9 (i)

101 The Corporation is a large organization. It has offices in various parts of West Bengal, Bihar and Assam, as shown by the said Rules, and possibly in other States also. The said Rules form part of the contract of employment between the Corporation and its employees who are not workmen. These employees had no powerful workmen's Union to support them They had no voice in the framing of said Rules. They had no choice but to accept the said Rules as part of their contract of employment There is gross disparity between the Corporation and its employees, whether they

e workmen or officers. The Corpo-
tion can afford to dispense with the
ervices of an officer. It will find hun-
reds of others to take his place but
n officer cannot afford to lose his job
ecause if he does so, there are not
undreds of jobs waiting for him. A
lause such as clause (i) of Rule 9 is
gainst right and reason. It is wholly
nconscionable. It has been entered
nto between parties between whom
nere is gross inequality of bargaining
ower. Rule 9 (i) is a term of the con-
act between the Corporation and all
s officers. It affects a large number
f persons and it squarely falls within
ne principle formulated by us above.
everal statutory authorities have a
lause similar to Rule 9 (i) in their
ontracts of employment. As appears
om the decided cases, the West Be-
gal State Electricity Board and Air
ndia International have it. Several
overnment companies apart from the
orporation (which is the First Appe-
ant before us) must be having it.
here are 970 Government companies
vith paid-up capital of Rs. 16,414, 9
rores as stated in the written arguments
ubmitted on behalf of the Union of Ind-
. The Government and its agencies and
nstrumentalities constitute the largest
mployer in the country. A clause
uch as Rule 9 (i) in a contract of em-
loyment affecting large sections of the
ublic its harmful and injurious to the
ublic interest for it tends to create
sense of insecurity in the minds of
hose to whom it applies and conse-
uently it is against public good. Such
a clause, therefore, is opposed to public policy and being opposed to public policy, it is void under section 23 of the Indian Contract Act.

102. It was, however, submitted on behalf of the Appellants that this was a contract entered into by the Corporation like any other contract entered into by it in the course of its trading activities and the Court, therefore, ought not to interfere with it. It is not possible for us to equate employees with goods which can be bought and sold. It is equally not possible for us to equate a contract of employment with a mercantile transaction between two businessmen and much less to do so when the contract of employment is between a powerful employer and a week employee.

103. It was also submitted on behalf of the Appellants that Rule 9 (i) was supported by mutuality inasmuch as it conferred an equal right upon both the parties, for under it just as the employer could terminate the employee's service by giving him three months' notice or by paying him three months' basic pay and dearness allowanc in lieu thereof, the employee could leave the service by giving three months' notice and when he failed to give such notice, the Corporation could deduct an equivalent amount from whatever may be payable to him. It is true that there is mutuality in clause 9 (i) the same mutuality as in a contract between the lion and the lamb that both will be free to roam about in the jungle and each will be at

liberty to devour the other. When one considers the unequal position of the Corporation and its employees, the argument of mutuality becomes laughable.

104. The contesting Respondents could, therefore, have filed a civil suit for a declaration that the termination of their service was contrary to law on the ground that the said Rule 9 (i) was void. In such a suit, however, they would have got a declaration and possibly damages for wrongful termination of service but the civil court could not have ordered reinstatement as it would have amounted to granting specific performance of a contract of personal service. As the Corporation is "the State", they, therefore, adopted the far more efficacious remedy of filing a writ petition under Article 226 of the Constitution.

105. As the Corporation is "the State" within the meaning of Article 12, It was amenable to the writ jurisdiction of the High Court under Article 226. It is now well established that an instrumentality or agency of the State being "the State" under Article 12 of the Constitution is subject to the Constitutional limitations, and its actions are State actions and must be judged in the light of the Fundamental Rights guaranteed by Part III of the Constitution (see, for instance, Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (AIR 1975 SC 1331). The International Airport Authority's case (AIR 1975 SC 1628) and Ajay Hasia's case (AIR 1981 SC 487). The actions of an instrumentality or agency of the State must, therefore, be in conformity with Art. 14 of the Constitution. The progression of the judicial concept of Art. 14 from a prohibition against discriminatory class legislation to an invalidating factor for any discriminatory or arbitrary State action has been traced in Tulsiram Patel's case (1985) 3 SCC 398 (at pages 473-476) : (AIR 1985 SC 1416 at Pp. 1458-1460). The principles of natural justice have now come to be recognized as being a part of the Constitutional guarantee contained in Art. 14. In Tulsiram Patel's case his Court said.

'The principles of natural justice have thus come to be recognized as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equality which is the subject-matter of that Article Shortly put, the syllogism runs thus : violation of a rule of natural justice results in arbitrariness which is the same as discrimination, where discrimination is the result of State action, it is violation of Article 14; therefore, a violation of a principle of natural justice by a State action is a violation of Article 14. Article 14, however, is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or State action violating them will be struck down. The Principles of natural justice, however, apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming within the definition of 'State' in Article 12, is charged with the duty of deciding a matter.',

106. As pointed out above, Rule 9(i) is both arbitrary and unreasonable and it also wholly ignores and sets aside the audi alteram partem rule it, therefore, violates, Art. 14 of the Constitution.

107. On behalf of the appellants reliance was placed upon the case of Radhakrishna Agarwal v. State of Bihar (1977) 3 SCR 249. The facts in that case were that a contract, called a "lease", to collect and exploit sal seeds from a forest area was entered into between the State of Bihar and the appellants in that casa. Under one of the clauses of the said contract, the rate of royalty could be revised at the expiry of every three years in consultation with the lessee and was to be binding on the lessee. The State unilaterally revised the rate of royalty payable by the appellats and thereafter cancelled the lease The Patna High Court dismissed the writ petition filed by the appellants and the appellants' appeal to this Court was also dismissed. In that case it was held that when a State acts purely in its executive capacity, it is bound by the obligations which dealings of the State with individual citizens import into every transaction entered into in exercise of its constitutional powers but this is only at the time of entry into the field of consideration of persons with whom the Government could contract and after the State or its agents have entered into the field of ordinary contract the relations are no longar governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. The Court then added (at page 255) (of SCR):

"No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract."

108. We fail to see what relevance that decision has to the case before us. Employees of a large organization form a separate and distinct class and we are unable to equate a contract of employment in a stereo type form entered into by "The State" with each of such employees with the "lease" executed in Radhakrishna Agarwal's case. Further, the contract or the lease between the parties in that case was a legally valid contract In that case what the appellants were doing was to complain of a breach of contract committed by the State of Bihar acting through its officers. The contesting Respondents are not complaining of any breach of contract but their contention is that Rule 9 (i) which is a term of their contract of employment is void They are not complaining that the action of termination of their service is in breach of Rule 9 (i). Their complaint

is not merely with respect to the State action taken under Rule 9 (i) but also with respect to the action of the State in entering into a contract of employment with them which contains such a clause or rather forcing upon them a contract of employment centaining such a clause. As we have held earlier, Rule 9 (i) is void even under the ordinary law of contracts.

109. We must now turn to two decision of the Bombay High Court as each party has relied strongly upon one of them, namely, S. S. Muley v. J. R. D. Tata; 1980 Lab IC 11 : (1979) 2 Serv LR 438 and Manohar P. Kharkar v. Raghuraj (1981) 2 Lab LJ 459 : (1983 Lab IC 350), commonly known as the "Makalu case" as it related to certain cables which were damaged in an aircraft named 'Makalu' belonging to Air India International. The decision in Muley's case (1980 Lab IC 11) (Bom) was relied upon by the Respondents while the decision in Makalu's case (1983 Lab IC 350) (Bom) was relied upon by the Appellants Both the cases related to Regulation 48 of the Air India Employees' Service Regulations framed by Air India International. Air India International is a corporation established under the Air Corporations Act, 1953 (Act No. 27 of 1953) and it is indisputably. "The State" within the meaning of Article 12 of the Constitution 48, the services of a permanent employee can be terminated "without assigning any reason" by giving him thirty days' notice in writing or pay in lieu of notice. In both thess cases, the services of the concerned employees were terminated under Regulation 48(a). The said Regulations also provided for dismissal of an employee who was found guilty of misconduct in a disciplinary inquiry held according to the procedure prescribed in the said Regulations. In Muley's case a learned single Judge of the Bombay High Court, Sawant, J., held the said Regulation 48 (a) to be void as infringing Article 14 of the Constitution. In West Bengal State Electricity Board,s case (AIR 1985 SC 722) this Court stated (at page 119) (of SCC). "The learned Judge struck down Regulation 48(a) and we agree with his reasoning and conclusion." The reasoning upon which Sawant, J., reached his conclusion was that there was no guidance given anywhere in the impugned Regulation for the exercise of the power conferred by it, that it placed untrammelled power in the anthorities, that it was an arbitiary power which was conferred and it did not make any difference that it was to be exercised by High ranking officials. In the Makalu case (1983 Lab IC 350 a contrary view was taken by a Division Bench of the Bombay High Court. The Division Bench rightly held that the employees of a statutory corporation did not enjoy the protection conferred by Article 311(2). It, however, further held that the phrase "without assigning any reason" used in the said Regulation 48 only meant a disclosure of the reasons to the

ployee concerned. After going into
facts which had been pleaded by
India International to justify the
mination of service of the petiti-
ers in the case, the Division Ben-
held that the impugned order were
tified. It further held Regulation
was not a one-sided regulation
ce under Regulation 49 the empl-
ee was also permitted to resign with-
t assigning any reason by giving
notice prescribed therein. The
vision Bench applied to the said
gulation 48 the analogy of the or-
nary law of master and servant un-
which no servant can claim any
urity of tenure. It also brought
it the analogy of the right to co-
pulsorily retire an employee where a
ovision in that behalf is made in
Service Rules. The Division Ben-
further held that it was difficult
conceive of any authority, which
s "the State" under Article 12 of
Constitutional guarantees contai-
d in part III of the Constitution,
minating the services of its emp-
ees without reason or arbi-
arily. It further held that the exi-
nce of relevant reasons was a sine
a non for exercising the power un-
Regulation 48. It went on to
te that because of the compelxity
modern administration and the un-
edictable exigencies which may arise
the course thereof, it was necessary
an employer to be vested with
wers such as those conferred by
gulation 48. The Division Bench
ok great pains to discern in some
of the sections of the Air Corporations Act guidelines for the exercise of the power conferred by Regulation 48. According to the Division Bench, the choice of Air India International to proceed under Regulation 48 would have to be dictated for the purpose of the needs and exigencies of its administration and if that power was exercised arbitrarily, the Court would strike down the action taken under Regulation 48.

110. We have invited by learned counsel for the Appellants to peruse the judgment in that case and we did so with increasing astonishment. Though the said judgment bears the date September 18, 1981, we were unable to make out whether it was a judgment given in the year 1981 or in the year 1881 or even earlier. We find ourselves wholly unable to agree with the view taken by the Division Bench. Apart from the factual aspects of the case, as to which we say nothing, we find every single conclusion reached by the Division Bench and the reasons given in support thereof to be wholly erroneous. The Division Bench overlooked that it was not dealing with a case of a non-speaking order but with the validity of a regulation. The meaning given by it to the expression "without assigning any reason" was wrong and untenable. Starting with this wrong premise, it has gone from one wrong premise to another. In the light of what we have said earlier about the principles of public policy evolved, and tested by the principle which we have

formulated, the said Regulation 48 (a) could never have been sustained. In West Bengal State Electricity Board's case, a three-Judge Bench of this Court said as follows :

> "The learned counsel for the appellant relied upon Manohar P. Kharkhar v. Raghuraj (1983 Lab IC 350) Bom) to contend that Regulation 48 of the Air India Employees' Service Regulations was valid. It is difficult to agree with the reasoning of the Delhi High Court that because of the complexities of Modern administration and the unpredictable exigencies arising in the course of such administration it is necessary for an employer to be vested with such powers as those under Regulation 48. We prefer the reasoning of Sawant, J. of the Bombay High Court and that of the Calcutta High Court in the judgment under appeal to the reasoning of the Delhi High Court."

The mention of the Delhi High Court in the above passage is a slip of the pen, for it was the Bombay High Court which decided the case. We are in respectful agreement with what has been stated in the above passage. The Makalu case was wrongly decided and requires to be overruled. We are, inhowever, informed that an appeal against that judgment is pending in this Court and rather than overrule it here, we leave it to the Bench which hears that appeal to reverse it.

111. We would like to observe here that as the definition of "the State" in Article 12 is for the purposes of both Part III and Part IV of tl Constitution, State actions, includi actions of the instrumentalities ar agencies of the State, must not on be in conformity with the Fundament Rights guaranteed by Part III but mu also be in accordance with the Dire tive Principles of State of Policy pr scribed by Part IV. Clause (a) of Art cle 39 provides that the State sha in particular, direct its policy towar "securing that the citizens, men ar women, equally have the right to ad quate means of livelihood." Artic 41 requires the State, within the limi economic capacity and developmen to "make effective provision for se uring the right to work". An adequat means of livelihood cannot be secure to the citizens by taking away withou any reason the means of livelihoo The mode of making "effective prov sion for securing the right to work cannot be by giving employment to person and then without any reaso throwing him out of employment. Th action of an instrumentality or agenc of the State, if it frames a servic rule such as clause (a) of Rule 9 o a rule analogous thereto would, there fore, not only be violative of Articl 14 but would also be contrary to th Directive Principles of State Polic contained in clause (a) of Art. 39 an in Article 41.

112. The Calcutta High Cour was, therefore, right in quashing th impugned order dated February 26 1983, terminating the services of th contesting Respondents and directin

e Corporation to reinstate them
id to pay them all arrears of salary.
ne High Court was, however, not
ght in declaring clause (i) of Rule 9
its entirety as ultra vires Art. 14 of
e Constitution and in striking down
being void the whole of that clause.
'hen the Calcutta High Court over-
oked was that Rule 9 also confers
oon a permanent employee the right
resign from the service of the Cor-
oration. Bye entering into a contract
' employment a person does not
gn a bond of slavery and a perman-
t employee cannot be deprived of
s right to resign. A resignation by
employee would, however, normally
quire to be accepted by the employer
order to be effective. It can be
at in certain circumstances an
nployer would be justified in refusing
accept the employee's resignation
, for instance, when an employee
ants to leave in the middle of a work
hich is urgent or important and for
e completion of which his presence
d participation are necessary. An
nployer can also refuse to accept the
signation when there is a disciplinary
quiry pending against the employee.
such a case, to permit an employee
resign would be to allow him to go
vay from the service and escape the
nsequences of an adverse finding
gainst him in such an inquiry. There
n also be other grounds on which
employer would be justified in not
cepting the resignation of an emplo-
e The Corporation ought to make
itable provisions in that behalf in
the said Rules. Therefore, while the judgment of the High Court requires to be confirmed, the declaration given by it requires to be suitably modified.

113. In the result, both these Appeals fail and are dismissed substituting for the declaration given by it a declaration that clause (i) of Rule 9 of the "Service, Discipline and Appeal Rules 1979" of the Central Inland Water Transport Corporation Limited is void under S. 23 of the Contract Act, 1872, as being opposed to public policy and is also ultra vires Art. 14 of the Constitution to the extent that it confers upon the Corporation the right to terminate the employment of a permanent employee by giving him three months' notice in writing or by paying him the equivalent of three months, basic pay and dearness allowance in lieu of such notice.

114. By interim orders passed in the Petitions for Special Leave to Appeal filed by the Corporation, we had granted pending the disposal of these Petitions a stay of the order of the Calcutta High Court in so far as it directed the reinstatement of the contesting Respondents. At that stage the Corporation had undertaken to pay to the said Respondents all arrears of salary and had also undertaken to pay thereafter their salary from month to month before the tenth day of each succeeding month until the disposal of the said Petitions. We hereby vacate the stay order of reinstatement passed by us and direct the Corporation forthwith to reinstate the First Respondent in each of these Appeals and to pay to

him within six weeks from today all arrears of salary and allowances payable to him, if any still remain unpaid.

115. The First Appellant in both these Appeals, namely, the Central Inland Water Transport Corporation Limited, will pay to the First Respondnset in each of these Appeals the costs of the respective Appeals. The other parties to these Appeals and the Intervener will bear and pay their own costs of the Appeals.

Appeals dismissed.

M. P. Thakkar
Judge
Supreme Court of India

OBSERVATION

Working employee have no requisite qualification—Person working as lecturer not ing requisite qualifications—Exemption granted—Exemption does not operate retr- ectively—U.P. Intermediate Education Act (2 of 1921), S. 16-E.

OBSERVED BY

E. S. Venkataramiah and
M. P. Thakkar
Hon'ble Judges Supreme Court of India.

IN

Civil Appeal No. 1609 of 1984, decided on 19-5-1986 between Shitala Prasad kla, Appellant v. State of U.P. and others, Respondents.

TEXT

Thakkar, J. :— Seniority is the e of contention.

2. The dispute centres round the stion as to whether the High Court right in affirming the view taken by District Inspector of Schools that pondents Nos. 5 and 6 were senior the appellant in the lecturer's grade the Kashiraj Maha Vidyalaya Inter lege, Orai, District Varanasi.

3. The dispute regarding inter iority having arisen amongst the afo- iid three persons, the District Inspec- of Schools examined the issue and dered a decision[1] dated January 8, 0 holding that Respondents Nos. 5 6 were senior to the appellant in the urer's Grade having regard to the that their appointment in the grade ame effective from 19-12-62, 1-7-63 and 23-7-1963 respectively.

4. The appellant challenged the decision by way of Writ Petition to the High Court affirmed the decision of the District Inspector of Schools and dismissed the Writ Petition. Thereupon the Writ Petitioner in the High Court has approached this Court by way of the present appeal by Special Leave.

5. The appellant was initially working as an Assistant Teacher in the aforesaid institution which was upgraded into an Intermediate College under the provisions of the Intermediate Education Act. The appellant started teaching Hindi in the Intermediate classes upon the institution being upgraded, though he was not qualified to be appointed as a lecturer in Hindi as per the relevant regulations[1] which enjoined

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[1] Under Regulation 3 (I) (f) of Chapter II of the Regulations framed under the U.P. Intermediate Education Act.

[1] Vide Appendix 'A' to the Regulations read with Regulation 1 of Chapter II read with S. 16-E of the Act.

that the minimum educational qualification for being appointed as a lecturer in Hindi was M.A. in Hindi and B A. with Sanskrit whereas the appellant did not possess the requisite qualification of B. A. in Sanskrit. It is not in dispute that the appellant did not possess the requisite qualification viz. B.A. degree in Sanskrit and was therefore not entitled to be appointed in the lecturer's grade as lecturer (Hindi) having regard to the prohibition contained in S. 16-F of the Intermediate Education Act.[2] The appellant however could have been appointed as a lecturer in Hindi if he was exempted from possessing such qualifications, in exercise of powers under sub-sec: (i) of S. 16–E of the Act.[3] The appellant made an application for exemption as envisaged by S. 16-E of the Act. This application was granted by the Board of High School and Intermediate Education, U. P by its order dated July 23, 1963. The contention of the appellant is that though the Board had actually granted exemption only on July 23, 1963, he must be deemed to have been exempted from November 4, 1960, the date on which he made the application for exemption. If the appellant is right in his submission that although he was factually exempted by the order of July 23, 1963 he must be deemed to have been exempted with retrospective effect from November 4, 1960, the appellant must succeed. If this contention is considered to be untenable the appellant must fail. The High Court has view that the appellant is entitled to be treated as having become duly qualified with the actual date of the grant of exemption on July 23, 1963 and that he cannot be treated as having been granted exemption with retrospective effect. In this view of the matter the appellant's seniority vis-a-vis Respondents 5 and 6 has been computed on the basis that the appellant was appointed on July 23, 1963 when he became qualified for being appointed to the lecturer's grade. The appellant has contended that the High Court has committed an error in not accepting his plea and reiterated the same submission before this Court.

6. The first question which must be answered is as to whether the plea of the appellant that he must be treated as having been exempted from possessing the qualification with retrospective

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[2] Section 16-F "Subject to the provisions hereinafter no person shall be appointed as a Principal, Head Master or teacher in a recognized institution unless he (a) possesses the prescribed qualifications or has been exempted under sub-sec. (1) of S. 16--E".

[3] Section 16-E. "(1) Qualifications for appointment as Pricipals, Head Masters and teachers of different subjects at different stages of the course shall be as prescribed by regulations : Provided that the Board may after considering the report of the Director exempt any person from the requirements of minimum qualifications having regard to his experience education and other attainments."

fect is well founded. We are of the pinion that the District Inspector of chools was right in taking the view at the appellant was absorbed as a cturce with effect from the date on hich the appellant had actually secured e exemption.

Developments in regard to the appl-ation exemption took the following ourse[1] :

-11-1960 : The appellant filed an application for exemption before the Board of High School and Intermediate Education, U. P. (Board).

-1-1962 : The Board had informed the appellant that his application for exemption was not in the proper form and that he should submit his application in the proper form.

5-1-1962 : The appellant filed the application in the proper form.

0-4-1962 : The Deputy Director of Education requested the appellant to obtain the minimum educational qualification (B. A. Degree in Sanskrit) by appearing in examination either from Varanasi Sankrit Vishwavidyalaya or from Gorakhpur University.

2-9-1962 : The appellant replied to this communication and stated therein that he was not in a position to pass the B.A. Examination in Sanskrit in the University mentioned by the Board.

23-7-1963 : After prolonged correspondence, the Board granted the exemption.

7. Thus it is clear that the Board was not inclined to grant the exemption to the appellant and had insisted on the appellant securing the requisite qualification by appearing in an examination, from an appropriate institution. The Board was disinclined to grant the request till late 1962. When this is the factual position, how can the appellant contend that the Board must be deemed to have granted the exemption from the date of this application i. e. November 4 1960 ? In this factual backdrop it is futile to contend that the Board had granted exemption with retrospective effect or that the exemption must relate back to the date of the making of the application. Besides, the language of S. 16E of the Act does not admit of the construction canvassed on behalf of the appellant viz. that the Board can grant exemption with retrospective effect. It is in terms provided that the exemption may be granted by the Board only after connsidering the report of the Director having regard to the experience, education and other attainments of the person sought to be appointed. It would be reasonable to construe the section as

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[1] As per facts stated on oath by Respondent No. 5 in his counter-affidavit f July, 1984 (p. 50 of the Appeal paper- book) which have not been speci-cally controverted by the appellant in the Rejoinder affidavit (p. 73 of the ppeal Paper-book).

enabling the Board to exercise the power to grant exemption prospectively after considering the report and taking into account the relevant circumstances which would by the very nature of things be with prospective effect and not with retrospective effect. To accede to the construction canvassed on behalf of the appellant would be to hold that any unqualified person can be appointed even without the minimum qualifications subject to post facto exemption being granted. Till the exemption is granted the person is "not qualified to be appointed In other words he would be lacking in the basic qualification for being appointed. This deficiency cannot be made good with retrospactive exemption unless the provision itself expressly or by necessary implication contemplates such a course of action. S. 16-E does not satisfy this test. Thus it would appear that retrospective exemption could not have been granted and in point of fact was not granted in the present case. Even otherwise, it is not sufficient to show that retrospective exemption could have been granted. It must also be shown that retrospective exemption was in fact granted. In the present case the factual background clearly shows that the Board had not granted retrospective exemption In fact the Board was not inclined to grant the exemption at all and was insisting that the appellant should obtain the requiste qualification. And the Board finally made up its mind to grant exemption only on July 23, 1963. Unlesss the view is taken that whenever exemption is granted it must be treated as having been granted with retrospective effect, if there is such power, the appellant cannot succeed. There is no warrant in law or logic for taking such a view. The High Court was therefore perfectly justified in repelling the contention urged on behalf of the appellant and in dismissing the Writ Petition.

8. There is also one more dimension of the matter. Though the appellant was working as a lecturer, it was not under any authority of law for there is no provision which empowers the college to allow any unqualified person to teach or to appoint him as such in anticipation of his disqulification being removed in future. Till the exemption was granted appellant was not even a teacher in the eye of law though he was allowed to teach by the indulgence of the college autorities. The disqualification was removed only on July 23, 1963 when the Board granted the exemption How could he have claimed seniority vis-a-vis respondents Nos. 5 and 6 who possessed the requiste qualifications and become regularly and lawfully appointed teachers much prior thereto?

9. An employee must belong to the same stream before he can claim seniority vis-a-vis others One who belongs to the stream of lawfully and regularly appointed employees does not have to contend with those who never belonged to that stream, they having been appointed in an irregular manner. Those who have been irregularly appointed belong to a different stream, and

cannot claim seniority vis-a-vis those who have been regularly and properly appointed, till their appointments became regular or are regularized by the appointing authority as a result of which their stream joins the regular stream. At that point of confluence with the regular stream, from the point of time they join the stream by virtue of the regularization, they can claim seniority vis-a-vis those who join the same stream later. The late comers to the regular stream cannot steal a march over the early arrivals in the regular queue. On principle the appellant cannot therefore succed. What is more in matters of seniority the Court does not exercise jurisdiction akin to appellate jurisdiction against the determination by the competent authority, so long as the competent authority has acted bona fide and acted on principles and fairplay. In a matter where there is no rule or regulation governing the situation or where there is one, but is not violated, the Court will not overturn the determination unless it would be unfair not to do so. In any view of the matter the appellant who did not even belong to the stream of regularly (he was allowed to teach only in an irregular and unauthorized manner) and lawfully appointed lecturers cannot claim seniorioty against any one already in the stream before he joined the stream himself. The view taken by the High Court is unexceptionable.

10. This appeal must accordingly fail and be dismissed with no order as to costs.

Appeal dismissed.

486
Report No. 57, P. 06

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

A. P. Sen
Judge
Supreme Court of India

OBSERVATION

Direct recruitment—Age limit for candidates specified—Determination of age of ndidate—Mode—Candidate attains the specified age not on the anniversary of his thday but on day preceding the anniversary of his birth day—Constitution of India, t 309—Rajasthan State and Subordinate Services (Direct Recruitment by Com- itive Examination) Rules (1962), R. 11B.

OBSERVED BY

A.P. Sen and
B.C. Ray
Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 531 of 1986 (In S.L.P. No 12608/85), decided on 28-8-1986 tween Prabhu Dayal Sesma, Appellant v. State of Rajasthan and another, Res- ndents.

TEXT

Sen, J. :— The short point invol- l in this appeal by special leave per- ns to the determination of age at a rticular point of time The question whether the appellant having his date birth as January 2, 1956 had attained age of 28 years on January 1, 1984 d was therefore disqualified from ing considered for direct recruitment the Rajasthan Administrative Ser- e under R. 11B of the Rajasthan ate and Subordinate Service (Direct ecruitment by Competitive Examina- on) Rules, 1962 (for short "the ules').

2. Put very briefly, the essential cts are these. The Rajasthan Public rvice Commission invited applica- ons for direct recruitment to the ajasthan Administrative Service and lied services of the Government of Rajasthan by a competitive examination to be held in 1983. Under the directions issued by the Commission, the minimum age prescribed for candidates was 21 years and the maximum 28 years. It was prescribed that the candidate should have attained the age of 21 years on January 1, 1984 and should not have attained the age of 28 years i e. on the first day of January next following the last date fixed for receipt of application. The appellant was allowed to appear in the written examination, but by an order dated June 12, 1984, the Assistant Secretary to the Commission intimated the appellant that his candidature was rejected on the ground that he had attained the age of 28 years on January 1, 1984 and was therefore ineligible for consideration. Feeling aggrieved, the appellant moved

the High Court under Art. 226 of the Constitution and contended that his date of birth was January 2, 1956 and that he had not attained the age of 28 years on January 1, 1984. His claim was contested by the respondents who pleaded that the appellant had attained the age of 28 years on January 1, 1984 and therefore his form was properly rejected. During the pendency of the writ petition, the High Court by an interim order dated September 14, 1984 directed the Commission to interview the appellant if he was otherwise eligible for being considered except on the ground of age. The appellant was accordingly interviewed but the result was withheld. A learned single Judge by his judgment and order dated January 19, 1985 held that if the date of birth of the appellant was January 2, 1956 he would complete the age of 28 years only at the end of the day of January 1, 1984 and therefore he could not be said to have attained the age of 28 years on that date He accordingly held that the Commission was not justified in rejecting the candidature of the appellant on the ground that he had attained the age of 28 years on January 1, 1984 and therefore was not eligible for consideration.

3. On appeal, a Division Bench disagreed with the view expressed by the learned Single Judge and reversed his judgment on the ground that the words used in R. 11-B of the Rules are, 'must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application, and not that he should have completed the age of 28 years on that day. They relied upon the undisputed fact that the first day of January next following the last date fixed for receipt of application in this case was January 1, 1984. Accordingly, they held that the appellant was born on January 2, 1956 and, as such, he had attained the age of 28 years as soon as the first day of January 1984 commenced. They further held that the appellant had not only attained the age of 28 years, but had also completed the same at 12' O clock in the midnight of January 1, 1984. According to the learned Judges, on January 2, 1984, the appellant would be one day more than 28 years and, as such, he was disqualified to appear at the examination under R. 11-B of the Rules. The conclusion of the learned Judges may best be stated in their own words:

> "In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding, the anniversary of his birth day."

4. In coming to that conclusion the learned Judges relied upon the language of R. 11-B of the Rules which prescribes the age limit for the said exmination and also referred to S. 4 of the Indian Majority Act, 1875. They have relied on certain decisions of different High Courts, particularly to that in G. Vatsala Rani v. Selection Committee for Amission to Medical Colleges, Bangalore, AIR 1967 Mys 135 and to some English decisions

ying down the principle for determin-
tion of age.

5. It is argued that the learned Judges
ere in error in introducing the
gal concept of the age of majority as
id down in S. 4 of the Indian Majority
ct, 1875 for the purpose of interpre-
ng R. 11B. It is said that the
rpose of R. 11B framed by the
overnment was to prescribe the
aximum and minimum age limits for
try into the Rajasthan Administrative
ervice and allied services of the
overnment of Rajasthan. It is submit-
d that as commonly understood, a
erson attains a particular age after he
as completed a given number of years.
is said that there is no reason why the
ords of R. 11B must have attained
e age of 21 years and must not have
tained the age of 28 years's should
ot be understood in the ordinary
nse. At first blush, the contention
dvanced appears to be rather attractive
ut on deeper consideration it cannot
revail.

6. Learned counsel for the appe-
ant drew our attention to the fact that
e Union Public Service Commission
as been interpreting the words 'must
ave attained the age of 21 years and
ust not have attained the age of 26
ears on the first day of August next
llowing' in the way the appellant
ontends for. These words are taken
om R. 4 of the Indian Administrative
ervice (Appointment by Competitive
xamination) Regulations, 1955 framed
y the Central Government in pursuance
of R. 7 of the Indian Administrative Service (Recruitment) Rules, 1954. Presumably, there would be similar provisions laying down the qualification as to age in other central services as well R. 4 insofar as material reads :

> "4. Conditions of Eligibility— In order to be eligible to compete at the examination, a candidate must satisfy the following conditions, namely :
>
> (i) x x x
>
> (ii) Age He must have attained the age of 21, and not attained the age of 28 on the first day of August of the year in which the examination is held :
>
> Provided that the upper age, limit may be relaxed in respect of such categories of persons as may from time to time, be notified in this behalf by the Central Government, to the extent and subject to the conditions notified in respect of each category."

7. Undoubtedly, the Union Public Service Commission has been interpreting the provision as to attainment of age in a like manner. This would be clear from the advertisement issued by it on Decmber 8, 1984 which is in these terms :

> "Age limit : (Ka) The candidate should have attained the age of 21 years on 1st August, 1985 but should not have attained the age of 26 years, that is, he should not have born before the 2nd August, 1959 and after the Ist August, 1964."

We are afraid, the interpretation of R. 11B of the Rules cannot proceed upon the basis adopted by the Union Public Service Commission.

Rule 11B of the Rules provides :

> "11-B. Age. Nothwithstanding anything contained regarding age limit in any of the Service Rules governing through the agency of the commission to the posts in the State Service and in the Subordinate Service mentioned in Schedule I and in Schedule II respectively, a candidate for direct recruitment to the posts to be filled in by combined competitive examinations conducted by the Commission under these Rules must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application."

8. It is plain upon the language of R. 11B that a candidate must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application. Last day fixed for receipt of application in this case, was January 1, 1983. First day of January next following that day would be January 1, 1984. The object and intent in making R. 11B was to prescribe the age limits upon which the eligibility of a candidate for direct recruitment to the Rajasthan Administrative Service and other allied services is governed. At first impression, it may seem that person born on January 2, 1956 would attain 28 years of age only on January 2, 1984 and not on January 1, 1984. But this is not quite accurate. In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding, the anniversary of his birth day. We have to apply well accepted rules for computation of time. One such rule is that fractions of a day will be omitted in computing a period of time in years or months in the sense that a fraction of a day will be treated as a full day. A legal day commences at 12 O'clock midnight and continues until the same hour the following night. There is a popular misconception that a person does attain a particular age unless and until he has completed a given number of years. In the absence of any express provision, it is well-settled that any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birth day.

9. In Halsbury's Laws of England, 3rd edn Vol. 37, para 178 at p. 100, the law was stated thus :

> "In computing a period of time, at any rate, when counted in years of months, no regard is generally paid to fractions of a day, in the sense that the period is regarded as complete although it is short to the extent of a fraction of a day........
>
> "Similarly, in calculating a person's age the day of his birth counts as a whole day : and he attains a specified age on the day next before the anniversary of his birth day."

10. We have come across two Eng- decision on the point. In Rex v. ffin, (1930) 1 KB 741 the question ; whether the accused had or had not npleted 21 years of age. S. 10 (1) he Criminal Justice Administration , 1914 provides that a person might sent to Borstal if it appears to the irt that he is not more than 21 years ige. The accused was born on Febr- y 17, 1909. Lord Hewart, C. J. 1 that the accused completed 21 rs of age on February 16, 1930 and : he was one day more than 21 years ige on February 17, 1930 which was Commission day of Manchester izes.

1. In Re, shurey v. Shurey (1918) 1 Ch the question that arose for decision this : Does a person attain a specifi- age in law on the anniversary of his ier birthday, or on the day preceding t anniversary? After reviewing the lier decisions, Sargant, J said that does not take cognizance of part of and the consequence is that person ins the age of twety-one years or of nty-five years, or any specified age, the day preceding the anniversary of twenty-first or twenty-fifth birthday ther birthday, as the case may be.

12. From Halsbury's Laws of gland, 4th edn, Vol. 45 para 1143 . 550 it appears that S. 9 of the nily Law Reforms Act 1969 has ogated the old common law rule stat- n re. Shurey, Savory v. Shurey (supra).

13. It is in recogition of the differ- e between how a person's age is lly construed and how it is understood in common parlance. The Legislature has expressly provided in S. 4 of the Indian Majority Act, 1875 that how the age of majority is to be computed. It reads :

> "4. Age of majority how computed —
>
> In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, it he falls within the first paragraph of S. 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of S. 3, at the beginning of the 18th anniversary of that day."

The Section embodies that in computing the age of any person, the day on which he was born is to be included as a whole day and he must be deemed to have attained majority at the beginning of the eighteenth anniversary of that day. As already stated, a legal day commences at 12 O' clock midnight and continues until the same hour the following night. It would therefore appear that the appellant having been born on January 2, 1956, he had not only attained the age of 28 years but, also completed the same at 12 O' clock on the midnight of January 1, 1984. On the next day i. e. on January 2, 1984, the appellant would be one day more than 28 years. The learned Judges were therefore right in holding that the appellant was disqualified for direct recruitment to the Rajasthan Administrative Service and as such was not entitled to appear at the examination held by the Rajasthan Public Service

Commission in 1983. We affirm the view taken by the learned Judges as also the decision in G. Vatsala Rani's case, (AIR 1967 Mys 135), (supra).

14. Before parting with the case we shall be failing in our duty if we do not advert to the undue hardship caused to the appellant. The appeallant had not only qualified at the written examination held by the Rajasthan Public Service Commission but was also called for an interview under the directions of the High Court. In case he cleared the interview, it would imply that the appellant would fail to secure entry into the Rajasthan Administrative Service just by one day because of the interpretation placed on R. 11B of the Rajasthan State and Subordinate Services (Direct Recruitment by Competitive Examination) Rules, 1962. We wish the Government would consider the question of relaxing the upper age limit in the case of appellant in order to mitigate the hardship, if otherwise permissible. There is need for a provision like the proviso to R. 4 of the Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955, conferring the power of relaxation on the State Government under certain conditions without which a candidate though deserved would be ineligible for appointment

15. The result is that the appeal must fail and is accordingly dismissed. There shall be no order as to costs.

Appeal dismissed

eport No. 63, p 01

V. Khalid
Judge
Supreme Court of India

OBSERVATION

Termination—Employee deputed to other dapartment by Gov. Employee con- nuing therein even after period of deputation—Termination of his lien—When perm- sible. (Constitution of India, Art. 309). Kerala Service Rules, Rr. 19 (a), 24.

OBSERVED BY

V. Khalid and G. L. Oza,
Hon'ble Judges, Supreme Court of India.

IN

Writ Petn. No. 3821 of 1978, decided on 19-9-1986 between V. Sridharan air, Petitioner v. State of Kerala and others, Respondents.

TEXT

Khaild, J, :—The petitioner was Laboratory Attendant in the Univers- Intermediate College (now called Arts ollege), Trivandrum in the Collegiate ducation Department He was deputed the City Improvement Trust as per overnment Order dated 24-10-61. The eriod of deputation was two years om the date of the Order or from the te of his relief from the College. He s relieved of his duties with effect om 30-10-61, by the Department of ollegiate Education His deputation riod was extended for a further per- d of one year from 1-11-63 and for urther period of two years with eff- t from 1-11-64. The extended period pired on 31-10-66. In the last order tending the period of deputation, it s made clear that no further exten- on would be allowed.

2. During the deputation period was promoted as Upper Division erk in the City Improvement Trust. The petitioner made a representation on 3-9-66, requesting the State Government to allow him to continue in the City Improvement Trust, terminating his lien in the Collegiate Education Department. No orders were passed by the Directorate of Collegiate Education or the Government on this representation.

3. The petitioner continued in the City Improvement Trust, on deputation. Meanwhile the City Improvement Trust was merged with the Kerala State Housing Board, respondent No. 3 herein. While so, on 29-9-72, orders were passed terminating the lien of the petitioner in the Department of Collegiate Education in purported exercise of the powers contained in Rule 24 of the Kerala Service Rules. A show cause notice was issued by the Director of Collegiate Education on 21-3-1973 asking the petitioner to submit his explanation against the proposed remo-

val of his lien in that department. The petitioner submitted a representation dated 26-3-1973, stating that he was not at fault in not joining duty in the parent department and that he was retained in foreign service anticipating Government's orders. In view of the merger of the City Improvement Trust with the Kerala Housing Board, he was not interested in continuing on deputation He further requested that the period after 1-11-1966, may be treated as an extension of the deputation period. The explanation was not accepted and orders were finally passed terminating the lien of the petitioner. Hence this writ petition.

4. It is necessary to state a few facts to understand what happened after the petitioner's deputation. The petitioner thought that he was secure in the deputed service and that he would stand to gain therein if he continued there when compared to his parent department. He had challenged the order passed by the Director of collegiate Education terminating his lien by filing Original Petition No. 3779 of 1973 in the Kerala High Court. Earlier he had filed an Original Petition No 31 of 1973 in the same High Court against the State of Kerala and the Kerala State Housing Board when he was reverted from the post of Upper Division Clerk to that of Lower Divison Clerk in the Housing Board, for not passing the Accounts Test. He succeeded in this writ petition. He appears to have been unduly elated over this success and allowed the original petition No. 3779 of 1973 to be dismissed as not pressed. The mai ground why he did not press the orig nal petition No. 3779 of 1973 was tha he had obtained a favourable order i the other original petition. As ill-luc would have it, the matter was taken i appeal by the State Housing Board an the Division Bench of the. Kerala Hig Court reversed that Judgment Thus, th petitioner was victim of unfavourabl circumstances and fluctuations in fortunes.

5. Normally we would have dismissed this writ petition on the shor ground that the petitioner had invoke the jurisdiction of the High Court unde Article 226 of the Constitution to ge the order under challenge in this wri petition, to be quashed, and after invoking this jurisdiction had allowed the original petition, wherein the said challenge was made, to be dismissed as not pressed. But, as indicated above, the petitioner at that time did not anticipate what was in store for him in future.

6. It was as per a Government order that he was deputed on foreign service. It is true that when the deputation was extended, it was made clear that the deputation would expire on 31-10-1966, finally The petitioner was put on notice that there would not be any further extension. There was some greater indifference on his part. But, there was inaction on the part of the respodent also. The petitioner had made a representation on 1-9-1966 to to the respondents on which no orders were passed till 29-3-1972. When the petitioner realised

it his prospects were not bright in the rala State Housing Board as he antiated earlier, he was left with no option t to press his case that the order ternating his lien was bad in law. We do t think that the petitioner should be ilted for this inaction when we find it this respondents also contributed in arge measure to the unhappy state of airs.

7. Rule 19 (a) in Part I Chapter of the Kerala Service Rules reads as lows :

> "An officer's lien on a post may in circumstances be terminated even h his consent, if the result will be to ve him without a lien or a suspended n upon a permanent post".

This rule mandates that an officer's n on a post shall not be terminated en with his consent if the consequence to leave him without a lien or a susnded lien upon a permanent post. The ate of Kerala. The Director of Colleate Education and the Kerala State ousing Board are parties to this writ tition. None of these parties have filed unter-affidavits. We do not know the vice conditions of the petitioner in e Housing Board We do not know iether he occupies a permanent post ere or not. Nor do we know whether has a lien or a suspended lien in the ousing Board. Without being apprised these details, the order of termination lien cannot be allowed to stand as it ould work great injustice against the titioner. Rule 24 of the Kerala Service iles is the next rule which is attracted in this case, which reads as follows :

> "Unless the Government, in view of the special circumstances of the case, otherwise determine, after five years' continuous absence from duty, an officer shall be removed from service after following the procedure laid down in the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960."

This rule speaks of removal from service when an officer has been continuosly absent from duty for five years. This rule speaks of the existence of special circumstances which will enable the department concerned to save an officer from its vice. This rule also speaks of the necessity to follow the procedure laid down in the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960, for removal of an officer from service. The assumption on the part of the department in this case is that the petitioner's continuance in the service of the Housing Board constitued absence from duty We cannot subscribe to this view in the absence of compelling materials. It was not a case of his absenting from duty after he was asked by the parent department to join it. At no time was he asked to join duty in the parent department. Without specific orders, the petitioner could not abandon the deputed foreign service and join the parent department. There should be a clear finding of continuous absence from duty by the department to attract Rule 24. The department also has to satisfy the Court whether the special circumstances of this case would not rescue the petitioner from the rigour of Rule 24. It is also necessary for this Court to be satisfied that the procedure laid down in the Kerala Civil Service (Classification, Control and Appeal) Rules, 1960, is complied with. The order terminating his lien is passed on the specious plea that his explanation is not satisfactory. The order should have been more articulate in its content. To sustain the order would virtually mean to deny the petitioner his service in the parent department and throwing him to the mercies of the Housing Board.

8. In this case, we are concerned more with consideration of justice than with mere technicalities of law. The petitioner has filed this writ petition as early as in 1978. It would be unfair and unjust to treat the period after 31-10-1966, to be one of continuous absence from duty. For an effective adjudication of the claim of the petitioner, his postition in the deputed foreig service, the service conditions there, h position there, etc , will have to be considered in detail. That has not bee done. Under these circumstances, w hold that the petitioner is entiled t succeed. Accordingly, we quash the o der No. B. 5-38127/66 dated 29th May 1973, issued by the Director of Colleg ate Education, Trivandrum, terminatin the lien of the petitioner herein and d rect the second respondent to issue fresh show cause notice, give th petitioner an opportunity to make hi explanation and also an opportunity o being heard and pass orders strictly i compliance with Rule 19 (a) and Rul 24 of the Kerala Service Rules and i accordance with law, it the second re pondent still feels that his lien shoul be terminated.

Order accordingly

port No. 64, p. 01

V. Khalid
Judge
Supreme Court of India

OBSERVATION

Contempt of Courts—Mere supression of a view or suggestion in noting files does t come within the view of contempt of court. Expression of a view is only a part of thinking process preceding governmental action.

OBSERVED BY

V. Khalid and
G.L. Oza,
Hon'ble Judges, Supreme Court of India

IN

Civil Appeal No. 871 of 1986 etc. decided on 28th April, 1987 between State of har and others, Appellants v. Kirpalu Shankar and others, Respondents.

TEXT

V. Khalid, J. —These appeals are rected against the Judgment of a vision Bench of Patna High Court Misc, case No. 356 of 1985. Appeal ɔ. 871 of 1986 is by the State of har, Appeal No 916 jointly by ideo Mishra, Judicial Commissioner, anchi (at the relevant time, Secretary-m-Legal Rememberancer, Department Law, Government of Bihar, Patna) d Mrs Radha Singh, Commissioner, anchi Division, Ranchi (at the relevant ne Additional Irrigation Commissio-r, Patna), Appeal No. 933 by Subh handra Jha, Public Relation Officer, rigation Department' Government of har, Patna and Appeal No. 1178 by rkeshwar Prasad Singh, now Professor d Head of Department Political ience, Magadh University (Member, har Public Service Commission, Patna the relevant time). The appella-s have been convicted by the High Court for contempt of its order and have been sentenced to a fine of Rs. 50/- in default to suffer simple imprisonment for two weeks The High Court had issued contempt notice against some others also. Those notices were discharged against them.

2 The background facts necessary can be now stated in brief as follows:—

In the Irrigation Department of the State of Bihar, there existed a post of Public Officer. This post became vacant some time in 1979. One Arun Kumar Verma was appointed to that post for six months. At that time one Kripalu Shanker was discharging the functions of Public Relation Officer. He laid claim to that post. He did not succeed. The Secretary to the Department did not accede to his request. Therefore, he filed C.W.J.C. No. 3632 of 1979. When the case came up for hearing, it was represented on behalf of the State that Shri Verma was appointed only on ad hoc basis for a period of six months and that after the expiry of six months, the matter would be referred to the Public Service Commission for consideration and at that stage the case of Kripalu Shankar also will be considered. It is submitted that on this assurance by the State, the petition was allowed to be withdrawn as per order dated 19-12-1979. It appears that this assurance was not respected, no reference was made to the Public Service Commission for regular appointment and the matter was kept in abeyance for along time. It is stated that in April, 1983, by which time Dr. Jagannath Mishra had become Chief Minister the State Government appointed Subh Chandra Jha as P.R O. again on ad hoc basis. This gave rise to the filing of petition no. 1534 of 1983 which was disposed of on 4–5-83. It was contended that this appointment was made without any advertisement and without consultation with the Public Service Commission. The learned Advocate General infored the Court when the matter came up for hearing that the appointment of Jha was only ad hoc giving an impression that regular appointment would be made after the expiry of six months. On this representation the following order was passed by the Court :

> "In the circumstances we direct that the post of Public Relations Officer in the Irrigation Department on which respondent 3 has been appointed on ad hoc basis should be filled up in a regular way. In case the appointment is not made within the period of six months, the ad hoc appointment shall stand terminated. We further direct that the fact that the respondent No 3 has worked on the post on ad hoc basis will not be taken to be a qualification for the purpose of any appointment through regular method on the post of Public Relations Officer."

3. The six months' period, according to the above order, was to expire on 17-10-1983. The case of the State is that the Irrigation Department had as early as 4-4-1983 written to the Public Service Commission to give concurrence to the appointment of Shri Jha, since his post was an ex-cadre post and since he was selected by a Selection Committee. Concurrence was given on 2-4-85. The Government there-after examined the matter in consultation with the Personnel (Administrative) Reforms Department, with reference to the provisions of the Rules governing reservations. The Government took a decision to send a requisition to the Bihar Public Service Commission for advertising the post. The Commission finally advertised the post on 12-5-1985, setting out the eligibility and criterion for selection.

4. Another Writ Petition was filed
the High Court as C.W.J C 2354/85
ith the allegations that the advertise-
ent was specially drafted to suit only
ıbh Chandra Jha. The matter was
ted or admission on 13-6-1985. Dur-
g the hearing of this petition the High
ourt felt on going through the records
cluding the notes file summoned for
oduction by the Court that its direc-
on in C.W.J.C. No. 1534/83 was dis-
garded and, therefore, rule was issued
oon the respondents to show cause
whthey should not be punished for
ntempt of the Court for ignoring its
der dated 4-5-1983, in the above men-
oned writ petition.

5. The State of Bihar and the
ommissioner-cum-Secretary, Irrigation
epartment who were respondent nos.
& 2 before the High Court expressed
egret but at the same time contended
at no contempt had been committed
y them for the reason that expression
f views the noting made on the files
hether they were right or wrong did
ot amount to contempt of court and
at no order was passed appointing
ubh Chandra Jha after 17-10-1983 to
vite any contempt action. The third
spondent also pleaded similarly and
xpressed regret for any omission on
is part The Bihar Service Commis-
on and its Executive Officer stated
at they has not committed any con-
empt, that Subh Chandra Jha's appoi-
tment, from 18-10-1983 should be
eated as a fresh appointment, that they
id not know about the order passed
in petition no. 1534 of 1983, that though concurrence was given, it was withdrawn when the correct facts were made know to them and that the withdrawal of the concurrence was duly communicated. The other respondents also adopted similar stand in the returns filed by the end.

6. Arguments in the contempt matter were heard for some time, and they were concluded on 12-8-1985 and the case was posted for Judgment. The Court went through the Government files and the files of the Bihar Public Service Commission. From the noting in the file, the High Court discovered that Mrs. Radha Singh, the then Additional Irrigation Commissioner and Birkeshwas Prasad Singh, Member, Bihar Public Service Commission and Sanjeevan Sharma, Section Officer, Bihar Public Service Commission, had also a part in the matter. Notices were, therefore, directed to be issued to them as well. They appeared and were heard on 25-9-1985.

7. The High Court considered the question of contempt on the following facts, which according to it were undisputed;

(i) The adhoc appointment of S. C. Jha must be terminated on 17-10-1983 as per its order

(ii) He was still working as P. R. O. whith the acquiescence of the concerned offiicers.

(iii) Concurrence of the Public-Service Commission was sought for bis fresh ad hoc appointment.

(iv) The Public Service Commission gave concurrence to the ad hoc appointment from October, 1983, by its order in May, 1985.

8. The High Court expressed itself, of what it felt about the disobedience of its order in para 4 of the Judgment as follows :

> "The State Government has ignored the order of the High Court. It had, therefore, to be made party. The Irrigation Commissioner-cum-Secretary is responsible for every act of his Department. It was, therefore, but natural that the procceeding should be drawn up against him also. Shrideo Mishra, Legal Remembrancer was proceeded against, as he advised the State Government on 10-10-1983 to seek concurrence from the Commission in the fresh ad hoc appointment of Subh Chandra Jha knowing full well the dictate of this Court that services of Subh Chandra Jha must be terminated after the expiry of six months. Incidentally, it may be stated once again that the six months period had expired on 17-10-1983. The Public Service Commission and the Special Executive Officer thereof have been proceeded against for granting concurrence to the Ad hoc appointment of Subh Chandra Jha. Subh Chandra Jha himself has been proceeded against for master minding the whole affair. Proceeding is against him too on that score The proceeding was initiated against A U. Sharma on footing that he was the Irrigation Commissioner in October, 1983 when the service on Subh Chandra Jha to be terminated. That is how the contemners have been proceeded against."

9. The High Court found the officers guilty for the reasons given below in Paragraph 22 of the Judgment. which we read so that the approach of the High Court could be properly appreciated.

> "It is necessary to consider the submission urged by learned Advocate General on behalf of the officers of the State and the public service commission The General submission was, that notings did not represent the concluded decision of the Government, and therefore, the officers were not liable for contempt of court. The proposition advanced by learned Advocate-General is rather too wide. A Govern-

ment file is not an individuals private property. It is public property. The opinions expressed therein are liable to reduce the credibility and the binding nature of the orders passed by the High Court, and that would amount to denigration of the State Judiciary. No. officer has the right to abuse the High Court or to ignore the orders passed by the High Court. I do not for a moment contend that for every noting in the file contrary to the view taken by the High Court will amount to contempt of court. It will depend upon the nature of the view noted in the file and whether the notings are intended to set the High Court's Order at naught maliciously. In the present case, the Order of the High Court was explicit. The Advocate General had advised exploitly that taking any steps to appoint Subh Chandra Jha ad hoc would amount to contempt of court and yet the officers were busy trying to find out how to ignore the High Court order. When the High Court's direction was to make the regular appointment through the B.P.S.C. where was the occasion for seeking concurrence of ad hoc appointment of Subh Chandra Jha. The whole file gives the impression that the officers in the state were not reconciled to the orders passed by the High Court. I am, therefore, unable to hold that some of the officers were not liable for contempt of court."

10. After considering the factual matrix before the Court, the Court held that there was no disobedience of its order by the Government and that the Government had taken a decision not to continue the ad hoc appointment but observed as follows :

> "The State of Bihar as a juristic person has certainly not committed contempt Because their Chief Minister Shri Chandresekhar Singh wrote on 8-1-1984 that the High Court order must be obeyed. On 10-3-1984, the Chief Secretary noted that Shri Jha should not be granted ad hoc appointment............the State of Bihar therefore cannot be held to be guilty of contempt of this Hon'ble Court........"

11. After this finding, the High Court held some of the officers of the Government guilty solely on the basis of the views expressed by them in the files, which were not, in fact, accepted by the Government and which were only at the stage of suggestions and views. Shri K.K. Venugopal, the learned counsel for the State contended that it would be unsafe to initiate action in contempt merely on the strength of notings by officials on the files, expressing their views and to do so would imperil the working of various pepartments in a Government in a democracy and would have far reaching consequences. Some

times a view expressed by an officer may be incorrect. The view so expressed passes through various hands and gets translated into action only at the ultimate stage. The views so expressed are only for internal use. Such views may indicate the line of thinking of a particular officer. Until the views so expressed culminate into an executable order, the question of disobedience of Court's order does not arise. Though the State Government have been found not guilty, the State has filed the appeal to protect its officers from independent and fearless expression of opinion and to see that the order under appeal does not affect the proper functioning of the Government.

12. It can not be disputed that the appeal raises an important question of law bearing upon the proper functioning of a democratic Government. A Government functions by taking decisions on the strength of views and suggestion expressed by the various officers at different levels, ultimately getting finality at the hands of the Minister concerned. Till then, conflicting opinions, views and suggestion would have emanated from various officers at the lower level. There should not be any fetter on the fearless and independent expression of opinions by officers on matters coming before them through the files. This is so even when they consider orders of courts. Officers of the Government are often times confronted with orders of courts, impossible of immediate compliance for various reasons. They may find it difficut to weekly submit to suc orders. On such occasions they wil necessarily have to note in the files, th reasons why the orders cannot b coplied with and also indicate that th courts would have not passed thos orders if full facts were placed befor them The expression of opinion by th officers in the internal files are for th use of the department and not for outside exposure or for publicity. To fin the officers guilty for expressing their independent opinon, even against order of courts in deserving cases, would caus impediments in the smooth workin and functioning of the Government These internal notings, in facts, ar privileged documents. Notings mad by the officers in the files cannot, in ou view, be made the basis of contemp action against each such officer wh makes the notings If the ultimate actio does not constitute contempt, th intermediary suggestion and view expressed in the notings, which ma sometimes even amount ex-faci disobedience of the courts orders, wil not amount to contempt of court These notings are not meant for publication.

13. In our considered view th internal notes file of the Government maintained according to the rules o business, is a privilege document. I the Government claims privilege o quasi-privilege regarding the note file we will not be justified in rejectin the claims outright. In the case, th notes file was brought to the Court no voluntarily by the Government. It wa

ummoned for by the Court. The Court can always look into it. The right of the Court to look into any iles, can never be denied. The contents of the notes file brought to Court get communicated to the Court because the Court looks into it. It would be dangerous to found an action for contempt for the views expressed in he notes file, on the discovery of unpleasant or unsavoury notes, on a perusal of the notes file by the Court after getting them summoned. This would impair the independent fnuctioning of the civil service essential to democracy. This would cause impediments in the fearless expression of opinion by the officers of the Governmeut. The notings on files differ from officer to officer. It may well be that the notes made by a particular officer, in same cases, technically speaking is in disobedience of in order of the Court or may be in violation of such order but a more experienced officer sitting above him can always correct him. To rely upon he notings in a file for the purpose of initiating contempt, in our view, therefore, would be to put the functioning of the Government out of gear. We must guard against being over sensitive, when we come across objectionable notings made by officers sometimes out of inexperience, sometimes out of over zealousness and sometimes out of ignorance of the nuances of the question of law involved.

14. Now, the functioning of Government in a State is governed by Article 166 of the Constitution, which lays down that there shall be a council of ministers with Chief Minister at the head, to aid and advise the Governor in the exercise of his functions under the Constitution, in his discretion. Article 166 provides for the conduct of Government business. It is useful to quote this Article:

> "166 (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.
>
> (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.
>
> (5) The Governor shall make rules for the more convenient transaction of the business of the Government to the State and for the allocation among Ministers of the said business with respect to which the Governor is by under this Constitution required to act in his discretion."

15. Article 166 (1) requires that all executive action of the State Government shall be taken in the name of the Governor. This clause relates to cases

the executive action has to be expressed in the shape of a formal order or notification. It prescribes the mode in which an executive action has to be expressed. Noting by an official in the departmental file will not, therefore come within this Article nor even noting by a Minister. Every executive decison need not be as laid down under Article 166 (1) but when it takes the form of an order it has to comply with Article 166 (1). Article 166(2) states that orders and other instruments made and executed under Article 166 (1), shall be authenticated in the manner prescribed. While clause(1) relates to the mode of expression, clause (2) lays dows the manner in which the order is to be authenticated and clause (3) relates to the making of the rules by the Governor for the more convenient transaction of the business of the Government. A study of this Article, therefore, makes it clear that the notings in a file get culminated into an order affecting right of parties only when it reaches the head of the department and is expressed in the name of the Governor, authenticated in the manner provided in Article 166 (2).

16. Viewed in this light, can it be said that what is contained in a notes file can ever be made the basis of an action either in contempt or in defamation, the notings in a notes file do not have behind them the sanction of law as an effective order. It is only on expression of a feeling by the concerned officer on the subject under review. To examine whether contempt is committed or not, what has to be looked into is the ultimate order. A mere expression of a view in notes file cannot be the sole basis for action in contempt. Business of a State is not done by a single officer. It involves complicated process. In a democratic set up it is conducted through the agency of a large number of officers. That being so, the noting by one officer, will not afford a valid ground to initiate action in contempt We have thus no hesitation to hold that the expression of opinion in notes file at different level by concerned officers will not constitute criminal contempt. It would not, in our view, constitute civil contempt either for the same reason as above since more expression or a view or suggestion will not bring it within the vice of sub-section (c) of Section 2 of the Contempt of Courts Act, 1971, which defines civil contempt. Expression for a view is only a part of the thinking process preceding Government action.

17. In the case of Bachhittar Singh v. The State of Punjab,-1962 (supp). (3) SCR 713, a Constitution Bench of this Court had to consider the effect of an order passed by a Minister on a file, which order was not communicated. This Court, relying upon Article 166 (1) of the Constitution, held that the order of the Revenue Minister, PEPSU could not amount to an order by the State Government unless it was expressed in the name of Rajpramukh as required by the said Article and was then communicated to the party concerned. This is how this Court dealt with the effect of the noting by a Minister on the file :

> "The question, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before. something amounts to an order of the State Government two things are necessary The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and then it has to be communicated. As already indicate, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file. As long as the matter rested with him the Revenue Minister could well score out his remarks or minutes on the file and write fresh ones"

The Court observed in this Judg-
nt that business of State is compli-
ed one and has necessarily to be con-
cted through the agency of a large
mber of official and authorities.
fore action is taken by the authority
ncerned in the name of the Rajpram-
n which formality is a Constitutional
cessity, nothing done would amount
an order creating rights or casting
bilities on third parties. It is pos-
le, observed this Court, that after
pressing one opinion about a particu-
matter at a particular stage a Minister or Council of Ministers may express quite a different opinion which may be opposed to the earlier opinion. In such cases, which of the two opinions can be regarded as the order of the State Government It was held that an opinion becomes a decision of the Government only when it must be communicated to the person concerned and that this in the essence of the matter. We seek support from these observations for our purpose that notings in a notes file, not only of officers but even that of a Minister will not constitute an order to affect others unless it is done in accordance with Article 166 (1) and (2) and communicated to the person concerned.

18. In England, absolute privilege is given to statements made by one officer of a State to another and such statements are protected in the context of law of defamation. Section 123 of the Evidence Act deals with privilege. We have already stated that State communications or acts of State in public interest, enjoy privilege and if that be so, disclosure in such communications made to the court will not constitute either contempt or defamation In any case such internal communications enjoy quasi-privilege and a disclosure in such communications cannot be made the basis of an action in contempt.

19. We have seen how the High Court approached the whole question from paragraph 22 extracted early in the Judgment.

20. It is clear that the High Court

based its conclusions purely on the notings in the file. The High Court felt that the offices of the Government did not like the orders passed by it and this, according to the High Court, was evident from the files before it. The High Court summed up its conclusion as follows in paragraph 24 of the Judgment.

> "To sum up, contempt of this Court has been committed by Shri Deo Mishra, Legal Remembrancer, Mrs. Radha Sinha, I.A.S. then working as Additional Commissioner" Irrigation Department and now working as Additional Finance Commissioner, Dr. Birkeshwar Prasad Singh, Sanjeewa Sharma and Subh Chandra Jha and I convict them accordingly. In regard to sentence, I am clearly of the view that there was motivation for it. The hand of the moving spirit has, however, remained concealed. It appears that the feeling amongst high officers of this state is that the High Court will not punish them for contempt of the High Court, as they are high officers and that all that the High Court will do in case of contempt of court is to give lectures and at times rant at them. To remove this misconception it is essential to impose upon them a fine of Rs. 50 (Rupees fifty) (each on all the five persons mentioned above, in default to suffer simple im
> risonment for two weeks. T
> rules issued against J.C. Kur
> dra, A. K. M. Nassan, A.
> Sharma and Arjun Prasad
> discharged".

21. We see that the High Cour
felt that there was an attempt on th
part of the officers to disobey its o
ders The officers had tendered apo
ogy. This was not accepted. We ar
concerned more than anyone in up
holding the dignity and prestige of th
High Court, but we have a duty a
the same time to lay down the la
correctly. We feel that the convictio
entered by the High Court purely o
the basis of the notes file cannot b
justified.

22. The High Court was unde
the impression that all the officers acte
in unions to help the 5th respondent
We now deal with his case separately
He is described by the High Court a
the Kingpin of the whole drama an
according to the High Court everybod
concerned acted for his benefit. Ther
is a veiled suggestion that he would no
have achieved what he wanted excep
with the help of political forces and
that there is an unseen hand behind
what he achieved. He was found guilty
of abetting the contempt.

23. According to him he has bee
made a scape-goat, that his is an unfortunate case of a journalist, appointe
as Public Relation Officer on ad hoc
basis for six months as recommended
by a selection committee at an interview held along with seven other can-

lidates. He joined service after such selection on 18-4-1983. As per the rder of the High Court, the period of ix months for making the regular appointment to his post was to expire on 7-10-1983. Long before this date, the rrigation Department had written to he Public Service Commission stating hat the post held by the appellant was n ex-cadre post and that concurrence nay be accorded for his appointement. This was an internal letter. The Government sent a requisition to the Public Service Commission for advertising the Post on 10-8-1984. The Commission ltimately made the publication on 2-5-1985 stating the eligibility and crieria for selection. It was this publiction that promoted the filing of the vrit petition in question in which the rder that gave rise to the contempt roceeding was passed. Regular appotment pursuant to the advertisement vas stayed. The appellant thus contined at the post.

24. According to him he has not isregarded the order of the High Court. he Bihar Public Service Commission ave concurrence for his appointment r six months. The post of P.R.O. eing an ex-cadre post since its creation 1955, the post could not be filled p by giving promotion to anyone orking in the department. It was contituted to interview candidates and to ecommend a suitable person. The apellant continues to function on the trength of the orders passed in his vour and he cannot be held to have ommitted contempt of the High Court's order. He has stated that he had no notice in the writ petition filed by Kripalu Shankar or the writ petition from which the present contempt arise. Though he was made a party no notice were ever issued to him and no direction was given to him by the High Court. According to him, apart from a general observation that he abetted in disregarding the order of the High Court, nothing specific has been attributed to him. His unqualified apology was also not accepted by the High Court. He also relies upon the fact that he was not paid salary from 18-10-1983 to date in re-inforcement of his submission that he has not committed any contempt.

25. With respect to the learned Judges, we find it difficult to agree wholly with them regarding the finding that the appellant was quilty of contempt. We do not have sufficient materials before us to conclude that the appellant exercised political clout to further his interest in utter disregard of the orders of the Court. Although it may be said that the conduct of the appellant is in some measure suspect, we do not find sufficient justification to enter a finding that he is guilty of contempt and that he acted in utter disregard of the High Court's order. It is useful to remember that apart from the notes file, there is no independent material before us to hold that the appellant had committed contempt. The Government pleader and the Advocate General had clearly advised the Government to act in accordance with the directions given by

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the High Court The minister who is the ultimate authority also acted in obedience to the orders of the High Court That being so, we find it difficult to agree with the finding that he is guilty of criminal contempt. The High Court felt that his was not a fit case to accept the unqualified apology tendered. However, we find, that on materials placed before us, it is not proved beyond doubt that he had committed contempt. We would, therefore, give him benefit of doubt and purge him of the contempt found against him.

26. We would like to outline the general principle on which confidentiality of State documents should be protected. The general principle is that if a person is involved in litigation, the Courts can order him to produce all the documents he has which relate to the issues in the case. Even if they are confidential, the Court can direct them to be produced when the party in possession does not produce them, for the other side to see or at any rate for the Court to see. When the Court directs production of these documents there is an implied understanding that they will not be used for any other purpose. The production of these documents in ordinary cases in imposed with a limitation that the side for whose purpose documents are summoned by the Court cannot use them for any purpose other than the one relating to the case involved.

Miss Harman's case, Home Office v. Harman-1981 (2) WLR 310, may give some assistance for this aspect of our discussion. The facts are as follows :

Miss Harman, a Solicitor, acted for a criminal. Michael Williams who was in prison serving a long sentence for robbery of the Bank. He complained that he was subjected to cruel and unusual punishments while in person contrary to the will of Rights and accordingly brought an action for damages against the Home Office. Miss Harman acted for him as a legal aid counsel Miss Harman acted for him as a legal aid counsel. Miss Harman got an order for discovery against the Home Office. The Home Office did not raise any objection regarding the production of the documents. However, it objected the use of the documents by the Group, called- "The National Council for Civil Leberties". Accordingly the documents were brought to Court and they were read out in open Court. Miss Harman passed the bundles of the documents to a journalist and a write up appeared in "The Guardian' which was highly critical of the Home Office. The Home Office took proceedings against Miss Harman for contempt of Court. She was held guilty for contempt by the High Court and was confirmed by the Court of Appeal and by the House of Lords. In the Court of Appeal, Lord Denning, despite his liberal views, while upholding the right of the Court to read documents relating to cases while conceding also the liberty to those esent in Court to listen when those ocuments were read and the reporter take down that was read, did not xtend to the press a right to any rther use of the confidential documnts or any further dissemination of eir contents without the consent f the owner. It is of no se to plead the freedom of the press, e said, that freedom is itself subject to estriction, Public confidential, it was id, should be kept confidential' in the ublic interest and should not be exosed to the ravages of outsiders. When e House of Lords' decision in Haran v. Secretary of State for the Home Department, 1983 AC 280, upholding e Court of Appeals was rendered, here was great hue and cry that the uling meant 'a black day for press freeom ... ...". Even o, Lord Denning regretted at the Court ever ordered disclosure f the documents and observed that the legal milestone will have to be taken p and set back a bit".

In Bachittar Singh's case (supra), rivelege was claimed regarding the production of which was sought, embodied e minutes of the meetings of the Coucil of Ministers showing the advice hich the Council ultimately give to e Rajpramukh. This Court help that hese documents fell within the category f documents relating to the affairs of tate within the meaning of Section 123 f the Evidence Act and were protected nder the said Section. Though the atio of the decision outlines the conervative view in the law relating to privilege, we are not unmindful of the fact that the doctrine of privilege received a shock treatment against the State at the hands of this Court in the judges' case, S.P. Gupta and others etc. v.Union of India and others etc. etc., 1982 (2) SCR 365 May we say that the legal milestone in Gupta's case, also needs a retreat, a bit,

27. Before darting with this case we would like to observe the need for restraint and care in dealing with the internal files of the Government. We have already indicated its privileged position and limited areas where exposure is permissible of the notings in the file. This is not to say that obsolute privilege can be claimed of its exposure and protection from the view of Courts. But what is to be borne in mind is that the notings in the departmental files by the hierarcy of officials are meant far the independent discharge Of official duties and not for exposure outside In a democracy, it is absolutely necessary that its steel frame in the form of civil service is permitted to express itself freely uninfluenced by extraneous considerations It might well be that even orders of Court come in for adverse remarks by officers dealing with them, confronted with difficult situations to straight away obey such ordres. Notings made on such occasions are only for the benefit of the officers concerned. When a subordinate official commits a mistake higher official will always correct it. It is necessory for Courts also to view such noting in the proper perspective In this case the Court, after looking into

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the notes file could have passed appropriate orders giving relief to the affected party and expressing its displeasure at the manner in which its order was implemented instead of initiating action on the notings made in the file. That way the Court would have enhanced its prestige.

28. It will not serve either the healthy working of civil service, public interest or democartic norms to proceed in contempt against officials solely on the basis of minutes in the internal files, notings which might even be unsavoury or even derogatory to an order of the Court, but which get ultimately corrected by the head of the department, ending with an order under Article 166 (1) and (2) in the name of the Governor in the proper form. We are conscious of the fact that learned judges felt that there was a deliberate attempt to act against their order. We are not unmindful of indignation shown by them at the notings in the file. The only reason why we feel constrained to disagree with the High Court's order is our anxiety to delineate the limits of judicial power while dealing with files of the Government and also of the Public Service Commission a high Constitutional authority. It is necessary to have mutual respect among the various wings of the administration, in the process of disposal of justice.

29. We allow these appeals and discharge the contempt orders passed by the High Court with utmost reluctance in view of the far reaching consequences that would flow if the judgment was allowed to stand. We are happy that appellants have tendered their regret apology to the High Court and have reiterated their regret in this Court also.

Appeal allowed.

eport No. 65, p. 01

O. Chinnappa Reddy
Judge
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OBSERVATION

Contract Labour (Regulation and Abolition) Act, 1970—Section 10—Catering
leaners appointed by the Contractors in Southern Railway satisfying all the condi-
ions of section 10(2) to abolish the contract system—Whether requires to be aboli-
hed—(yes)—Appropriate order—Court directed to Central Government to take app-
opriate action under section ot prohibiting the employment of contract labour as
uch.

OBSERVED BY

O. Chinnappa Reddy and V. Khalid
Hon'ble Judges, Supreme Court of India.

IN

W. P. No. 19 of 1986 decided on 4th February, 1987 between Catering Cleaners
f Southern Railway etc.—Petitioners v. Union of India and Anr. Respondents.

TEXT

Chinnappa Reddy, J. :—The peti-
ioners describe themselves as 'catering
leaners of Southern Railways represen-
ed by V. China Thambi and M. Mohan
f the Vegetarian Refrehment Room
entral Station, Madras'. The petition
s claimed to be filed in a representative
apacity on behalf of about three hun-
lred and odd catering cleaners working
n the catering establishments in various
ailway junctions the Southern Rail-
vay and in the pantry cars of long dis-
ance trains running under the control
f the Southern Railway. Since a long
ime they have been agitating for the
bolition of the Contract system under
vhich they are employed to do cleaning
vork in the catering establishments and
he pantry cars and for their absorption
s regular employees of the principal
mployer, namely, the Southern Rail-
vay. They complain that they are not
even paid minimum wages. They are paid a pittance averaging from Rs. 2.00/ to Rs. 2.50/- per day. Although the contract system has been abolished in almost all the other Railways, the Southern Railway persists in employing contract labour for cleaning its catering establishments and pantry cars. As the serveral representations made by them to the authorities concerned proved fruitless they have been forced to seek the intervention of this Court under Art. 32 of the Constitution to direct the respondents to exercise their powers under section 10 (1) of the Contract Labour (Regulation and Abolition) Act, 1970 and to abolish the contract system in respect of catering cleaners in the Southern Railway and further to direct the respondents to regularise the services of the existing catering clearners employed in the catering establishments at various

junctions and in the pantry cars of long distance trains and to absorb them as employees of the catering establishments of the Southern Railway. They also seek a direction to extend to them the service benefits presently available to other categories of employees in the catering establishments of the Railways.

2. We issued notice to the respondents on January 21, 1986. After some considerable time the writ petition was listed before us on August 5, 1986. We were informed at that time that in almost all the railways except the Southern Railway, the contract labour system had been abolished in regard to catering cleaners. We wondered why the Southern Railway could not also fall in line and directed the Southern Railway Administration to consider whether the contract labour system could not be abolished in the Southern Railway also and whether the services of the catering cleaners could not be suitably regularised. The learned counsel for the workmen complained before us that the workmen were not even being paid the minimun wages. As the Railway Administration was the principal employer, we directed the Railway Administration to take immediate steps to see that the minimum wages were paid to the catering cleaners. As the interim order of the Court regarding payment of wages was not complied with, the petition was adjourned from time to time. On April 19, 1986 we also made a further order that the Southern Railway Administration should not take any further action pursuant to the tenders invited by them for contract labour. On December 4, 1986 the Additional Solicitor General who appeared on behalf of the Railway Administration undertook to deposit the arrears due from August upto date with the Deputy Labour Commissioner, Madras. We also directed the learned counsel for the employees to fill a list of the employees entitled to be paid wages We directed that the amount should be paid after verification by the Deputy Chief Superintendent, Southern Railway. We were told that there is some dispute about the names of the employees, We now directed that the Deputy Labour Commissioner, Madras will enquire into the question as to who were working as Catering cleaners in the Madras Central Station, and also to determine the wages due to them from August, 1986 upto date giving credit to any amount that may have been paid to them. On such determination, the Railway Administration shall deposit the amount with the Deputy Labour Commissioner who shall pay over the same to the employees. The determination by the Deputy Labour Commissioner is directed to be completed before February 28, 1987 and the deposit by the Administration is directed to be made before March 15; 1987. This part of the order covers only the catering cleaners employed in the Central Station, Madras.

3. In answer to the writ petition the Railway Administration has adopted a somewbat unhelpful attitude.

rding to the Administration it has een found to possible to abolish ontract labour system because the re of the cleaning work in the ring units of the Southern Railway fluctuating and intermittant The ract labour system is followed not in the Southern Railway but also e South Central Railway and the h Eastern Railway. They claim any departmental units not working itably could be handed over to a ate licensee and this was the altern- that was adopted by the Southern way in the case of catering clea- Experience showed that it was cult to extract work from catering ners if they were engaged on a regu- asis by the railway and it was not ible to supervise their work effect- . According to them, all pros cons were examined before entru- the cleaning work to private ractors. The Southern Railway a moral responsibility to the public nsure satisfactory, service and that the reason why the work was entru- to a private agency which was idered the most suitable method oing the work.

4. We notice that the Railway inistration has not chosen to supp- its statements by any facts and res but has contented itself aking vague and general statements. attempt has been made to ain why what has been done in of the other railways cannot be should not be done in the Southern way too It is not explained why cleaning work is considered to be intermittent and what difficulty exists in supervising the work. The Railway Administration wants to suggest that the units are working at a loss without expressly saving so. The suggestion is implicit in the statement that departmental units not workins profitably could always be handed over to private licencees. We are afraid that everything that has been said by the Administration of the Southern Railway against abolishing the contract labour system and regularising the services of the catering cleaners has been contradicted by the Parliamentary Committee of Petitions under the Chairmanship of Shri K. P. Tewari who went into the question in some depth. The Committee was submitting its report on the complaint of Shri Samar Mukherji, a member of Parliament regarding the grievances of the Railway catering workers working under contractors in the Southern Railway. The Committee first dealt with the grievances of the Bearers and Servers In paragraph 2 19 of their report the Committee noticed that the railway catering department was earning a profit of about Rs. 50 lakhs per annum. In paragraph 2.21 the Committee dealt with the grievances of the catering cleaners We think that it will be useful to extract here the whole of paragraph 2.21 of the report. It is as follows:—

"It has been submitted in the representation that as the job of the cleaners is of permanent nature, these cleaners should be absorbed by the

Railways on regular basis. During their study visit, it was pointed out by the petitioners to the Committee that cleaners were not paid minimum wages statutorily fixed by State Governments by the contractors and there was no machinery set up by the Southern Railway to ensure that all labour laws regarding minimum wages, overtime allowances, payment of compensation etc. were implemented in their case. In this connection, the Ministry of Railways (Railway Board) in their written note have stated that the work of cleaning is entrusted to contractors as per the recommendations of High Power Committee (Alages an Committee) appointed by the Ministry of Railway in the year 1955 so that the establishment cost could be kept down. If this work is entrusted to the regular Railway employees the establishment cost would go up and this would prove to be an uneconomical proposition. The Ministry have further stated that the cleaning contractors at Madras and Bangalore City have engaged 61 and 22 cleaners respectively who are paid fair living wage of Rs. 5.25 per head at Madras Central Railway Station and at Rs. 8.06 per cleaner per day at Bangalore City Railway Station as fixed by the State Government of Tamil Nadu, Karnataka. These payments are witnessed by the Railway's representative.

The Committee, however, are of the opinion that the job of cleaning in Railway Catering Units is of a permanent nature. Further if the work which is at present being done by a very small number of eleaners employed through the contractors by th Southern Railway is entrusted to th regular employees the establishment cos would increase only marginally and i will not in any way affect the profit being earned by the Catering Department. The Committee recommended tha the Government should review the present practice of employment o cleaners through contractors and consider their employment directly by the Railways. This would end the exploitatation of cleaners which has also been alleged in the representaiton.

K.P. Tewari
New Delhi Chairman
Dated the 30th April, 1984
Vaisaka 10, 1906 (Saka) Committee
of Petitions”

5. The Report, we see, states that the railway catering department was earning a profit, that the work of the catering cleaners was of a perennial nature, that the cost of entrusting the work to regular employees would increase the establishment cost only marginally and that the laws relating to minimum wages, over time allowance etc. and other labour laws were not being observed in regard the catering cleaners. The recommendation of the Committee was that in order to prevent the exploitation of cleaners, it was necessary that the Government should review the existing practice of employing them through contractors and consider their direct employment by the Railway Admnistration Strengthened by the report of the Committee, the catering cleaners submitted several

memoranda to the authorities concerned but to no avail.

6. The practice of employing abour through contractors for doing vork inside the premises of the primary mployer, known to researchers of the nternational Labour Organisation ind other such organisations as Labour only contracting' or 'inside ontraction' system has been termed as in archaic sytem and a relic of the arly phase of capitalist production, vhich is now showing signs of revival n the more recent period. Of late there ias been a noticeable tendency on the art of big companies including public ector companies to get the work done hrough contractors rather than through heir own departments. As pointed out y a group of reasearchers in the Econo-ic and Political Weekly, Review of anagement, dated November 29, 986, it is a matter of surprise that mployment of contract labour is stea-ily on the increase in many organised ectors including the public sector, vhich on expects of function as a nodel employer. More than a quarter f a century ago in the Standard Vacuum efining Company of India Ltd. v. Its Vorkmen 1960 (3) S. C. R. 466. this ourt had occasion to refer to some of he pernicious features of the contract abour system. It is an important lecision, unfortunately not very much ioticed in later cases. The importance of the case lies in the fact that it was ield to be competent for an Industrial ribunal functioning under the Indus-rial Disputes Act to abolish the contract labour system in an industrial undertaking which happened to be a private enterprise in that case. The facts are interesting. A dispute was raised by the workmen of the company with respect to contract labour, employed by the company (the Standard Vacuum Refining Company of India Limited) for cleaning maintenanee of the refinery (plant and premises), belonging to the company. The system was that the work was entrusted to a contractor who engaged the labour. The regular workmen of the Company made a demand for abolition of the contract system and for absorbing the workmen employed through the contractors into the regular service of company. The complaint of the workmen was that the contract labour had no security of service though they were doing the work of the company and that they were being paid much less than the wages paid by the company to its unskilled regular workmen. They were also not entitled to other benefits and amenities such as provident fund, gratuity, bonus, privilege leave, medical facilities and subsidised food and housing to which the regular workmen of the company were entitled. Their case was that though the work was of a permanent nature, the contract system had been introduced to deny them the rights and benefits which the company gave to its regular employees. On behalf of the company, it was contended that the reference under Section 10 of the Iedustrial Disputes Act was incompetent as there was no dispute between the Company and

its workmen, that, it was a matter for the Company to decide what was the best method of carrying out its cusiness, whether by employing a Contractor or otherwise and that the Industrial Tribunal could not interfere with that function of the managment The dispute regarding wages and conditions of service was really one to be settled between the Contractor and his employees and had nothing to do with the Company. The Tribunal by its award gave a direction to the company to discontinue the practice of getting the work done through contractors and to have it done through workmen engaged by itself. The company was directed to engage regular workmen for this work and to give preference to the workmen employed by the contractor. There was an appeal to the Supreme Court by Special leave under Article 136 of the Constitution The Supreme Court held that the Tribunal was justified in giving the direction for the abolition of the contract system, observing that it was relevant to bear in mind that industrial adjudication generally did not encourage the employment of contract labour in modern times. Quoting from the report of the Royal Commission on Labour, it was said that whatever merit there was in the system in primitive times, it was now desirable for the management to discharge completely the complex responsibility laid upon it. The Court also referred to similar opinions expressed by several Labour Enquiry Committees appointed in different States. Proceeding to consider the merit of the contract labour system in the case before them. Wanchoo J. speaking for the Court observed :—

> "The contract in this case related to four matters. But the reference is confined to one only, viz., cleaning maintenance work at the refinery including premises and plant and we shall deal with that only. So far as this work is concerned, it is incidental to the manufacturing process and is necessary for it and of a perennial nature which must be done every day. Such work is generally done by workmen in the regular employ of the employer and there should be no difficulty in having regular workmen for this kind of work. The matter would be different if the work was of intermittent or temporary nature or was so little that it would not be possible to employ full time workmen for the purpose. Under the circumstances the order of the tribunal appears to be just and there are no good reasons for interfering with it".

The Court held that the contract in the case was a bona fide contract but that it did not affect the issue. The award of the Tribunal was upheld.

7. The supreme Court having pronounced on the 'primitive' and baneful nature of the system of contract labour, there was cry raised against the system by the Planning Commission

port No 65, p. 07

l various other committeess appointed
the Government. The Indian Labour
nference discussed the award of the
bunal in 1959 and following its
ommendation but after considera-
delay, the Contract Labour (Aboli-
n and Regulation) Act was passed in
e Statement of Objects and Reasons
s as follows :—

> "The system of employment of contract labour lends itself to various abuses. The question of its abolition has been under the consideration of Government far a long time. In the second Five year plan, the Planning Commission made certain recommendations, namely, under taking of studies to ascertain the extent of the problem of contract labour, progressive abolition of system and improvement of service, conditions of contract labour where the abolition was not possible. The matter was discussed at various meetings of Tripartie Committees at which the State Government were also represented and general consensus of opinion was that the system should be abolished wherever possible or practicable and that in cases where this system could not be abolished altogether, the working conditions of contract labour should be regulated so as to ensure payment of wages and provision of essential amenities.
>
> The proposed Bill aims at abolition of contract labour in respect of such categories as may be notified by appropriate Government in the light of certain criteria that have been laid down, and at regulating the service conditions of contract labour where abolition is not possible. The Bill provides for the setting up of Advisory Boards of a tripartite character, representing various interests, to advise Central and State Governments in administering the legislation and registration of establishments"

and contractors. Under the Scheme of the Bill, the provision and maintenance of certain basis welfare amenities for contract labour, like drinking water and first-aid facilities, and in certain cases rest-rooms and canteens, have been made obligatory. Provisions have also been made to guard against details in the matter of wage payment."

The long title of the Act describes it as 'an Act to regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith." Section 1 (4) makes the Act applicable to all establishments in which 20 or more workmen are employed or were employed on any day of the preceeding 12 months as contract labour and to every contractor who employs or who employed on any day of the preceding 12 months 20 or more workmen. Section 1 (5) makes the Act inapplicable to establishments in which work only of an intermittent or casual nature is performed and further provides that the question whether work performed in an establishment is of an intermittent or casual nature, if raised, shall be decided by the appropriate Govt. in consultation with the Gentral Board or State Board as the case may be and that such decision final Sec. 2 (b), (c) and (g) define "Contract Labour", "Contractor", "Establishment" and "Principal Employees" in the following terms :—

"(b) a workman shall be deemed to be employed as "contract labour" in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer;

"(c) 'contractor', in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor;"

"(e) "establishment" means—

(i) any office or department of the Government or a local authority, or

(ii) any place where any indu stry, trade, business, man ufacture or occupation i carried on;"

"(g) "principal employer" means

(i) in relation to any offic or department of the Gov ernment or a local autho rity, the head of tha office or department o such other officer as th Government or the loca authority, as the case ma be may specify in thi behalf.

(ii) in a factory, the owner o occupier of the factor and where a person ha been named as the mana ger of the factory unde the Factories Act, 1948 the person so named,

(iii) in a mine, the owner o agent of the mine and where a person has been named as the manager o the mine, the person so named,

(iv) in any other establishment, any person responsible for the supervision and control of the establishment.

Explanation :— For the purpose of sub-clause (iii) of this clause, the expressions "mine", "owner" and "agent" shall have the mean-

> ings respectively assigned to them in clause (j) clause (1) and clause (e) of sub-section (1) of section 2 of the Mines Act 1952."

ection 3 and 4 provide for the consti-tion of the Central and State advisory oards. Section 7 provides for the reg-tration of establishments. Section 8 ovides for revocation of registration certain cases and Section 9 prescribes e effect of non-registration. Section) provides for the prohibition of emp-yment of contract labour in certain ocesses, operations or other work in tablishments by the appropriate Gov-nment after consulastion with the entral or State Board as the case may e Cec. 10 is as follows :—

"10 (1) Notwithstanding anything contained is this Act, the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process-operation or other work in any establishment.

(2) Before issuing any notification under sub-sec. (1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for contract labour in that establishment and other relevant factors, such as—

(a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment.

(b) whether it is of perennial nature, that is to say it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on that establishment :

(c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto ;

(d) whether it is sufficient to employ considerable number of whole time Government workmen.

Explanation :— If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate thereon shall be final."

Section. 19 provides for licensing of contractors Sections. 13, 14 and 15 provide for the grant, revocation, suspension, and amendment of licenses and appeals. secs. 16 to 21 make detailed provision for the welfare and Health of contract labour. Section 16 deals with canteens, Section. 17 with Rest rooms, Section. 18 with facilities for drinking water, latrines, urinals and washing and Sec. 19 with first-aid facilities Section 20 provides that if any amenity required to be provided under Sections 16 to 19 for the benefit of contract labour employed in an establishment is not provided by the contractor within the prescribed time such amenity shall be provided by the Principal Employer within such time as may be prescribed Section 21, while making the contractor responsible for payment of wages to each worker employed by him as contract labour, further provides that every principal Employer shall nominate a representative duly authorised by him to be present at the time of disbursement of wages by contractor ensure and certify that wages are paid in the prescribed manner. It is further provided that if the Contractor fails to pay wages within the prescribed time or makes short payment, it shall be the liability of Principal Employer to make payment of wages in full. Section 22 to 27 provide for penalties and procedure. Sec. 28 provides for appointment of inspectting staff Section 30 makes the provisions of the Act effective notwithstanding anything inconsistent therewith contained in any other law or in the terms of any agreement or contract of service or any standing orders applicable to the establishmen. Any favourable benefits that the Contract labour may be entitled to under the agreement contract of service or standing orders are however saved Section. 31 provides for exemptions. Section 33 ena the Central Government, to give di tions to any State as to the carrying to execution in the State the provisi of the Act. Section 35 provides the making of rules for carrying out purposes of the Act. The Rules ma by the Central Government are requi to be placed before the Parliament.

8. The Central Government; exercise of the powers conferred by ction 35 of the Act, has made the C ntract Labour (Regulation and Ab lition) Central Rules, 1971 Chap II of the rules relates to matter pe aining to the Central Board, while c apter III of the Rules deals with reg tration of establishments and licensi of contractors Rule 25 prescribes t forms, terms, and condition of licen and in particular Rule 25 (ii) (iv) pr scribes that it shall be the conditio of every license that the rates of wag shall not be less than the rates presc bed under the Minimum Wages Ac 1948, Rule 25 (ii) (iv) prescribes th it shall be the condition of every licen that the rates of wages shall not be le than the rates prescribed under th Minimum Wages Act, 1848 for suc employment where applicable, an where the rates have been fixed by ag reement, settlement or award, not les than the rates so fixed, Rule 25 (ii) (a) prescribes that it shall be the con dition of every licence that,

> "in cases where the workme employed by the contracto perform the same or simila kind of work as the workme

> directly employed by the principal employer of the establishment, the wage rates, holidays, hours of work and other conditions of service of the workmen of the contractor shall be the same as applicable to the workmen directly employed by the principal employer of the establishment on the same or similar kind of work :
>
> Provided that in the case of any disagreement with regard to the type of work the same shall be decided by the Chief Labour Commissioner (Central) whose decision shall be final."

Similarly Rule 25 (ii) (v) (b) provides that in other cases the wage rates, holidays hours of work and conditions of service of the workmen of the contractor shall be such as may be specified in this behalf by the Chief Lebour Commissioner (Central). While determining the wage rates, holidays, hours of work and other conditions of service under rule 25 (ii) (v) (b) the Chief Labour Commisioner is required to have regard to the wages rates, holidays, hours of work and other conditions of service obtaining in similar employments.

9. On the facts presented to us and on the report of the Parliamentary Committee of Petitions it appears to be clear that the work of cleaning catering establishments and pantery cars is necessary and incidental to the industry or business of the Southern Railway and so requirement (a) of Section 10 (2) is satisfied, that it is of a perennial nature and so requirement (b) is satisfied, that the work is done thosrugh regular workmen in most Railways in the country and so requirement (c) is satisfied and that the work requirei the employment of sufficient number of wholetime workmen and so requirement (d) is also satisfied. Thus all the relevant factors mentioned in Section 10(2) appear to be satisfactorily accounted for. In addition we have the factor of profitability of the catering establishments. On these facts the petitioners straight away invite us to issue a mandamus directing the Central Government to abolish the contract labour system under which cleaners in catering establishments and pantery cars are at present employed in the Southern Railway. But, refrain from doing so because under Section 10, Parliament has vested in the appropriate Government the power to prohibit the employment of contract labour in any process, operation or other work in any establishment. The appropriate Government is required to consult the Central Board or the state Board as the case may be before arriving at its decision. The decision, of course, will be subject to judicial review. But we do not think we will be justified in issuing the mandamus prayed for unless and until the Government fails or refuses to exercise the power vested in it under

O. Chinnappa Reddy
Judge
Supreme Court of India

Section. 10. In the circumstances the appropriate order to make in the present case is to direct the Central Government to take appropriate action under section 10 of the Contract Labour (Abolition and Regulation) Act in the matter of prohibiting the employment of contract labour in the work of cleaning catering establishments and pantery cars in the Southern Railway. This must be done within six months from today, without waiting for the decision of the Central Government the administration of the Southern Railway will be free, of its own motion to abolish the Contract labour system and to regularise the services of those employed in the work of cleaning catering establishments and pantery cars in the Southern Railway. In any case, the administration of the Southern Railway will refrain, until the decision of the Central Government under section 10 from employing Contract labour. The work of cleaning catering establishments and pantery cars will be done departmentally by employing these workmen who were previously employed by the Contractor on the same wages and conditions of work as are applicable to those engaged in similar work by the Western Railway. If there is any dispute whether an individual workman was or was not employed by the Contractor such dispute shall be decided by the Deputy Labour Commissioner, Madras. Any further directions may be sought, if necessary, from the Madras High Court. If the Central Government does not finally decide the question within six months from today, the Southern Railway administration will within three months thereafter absorl the workmen into their service and regularise their services.

Report No 66, p. 01

O. Chinnappa Reddy
Judge
Supreme Court of India

OBSERVATION

Income Tax Act—Section 89—Income Tax Rules—Rule 21A—Illegal termination—Awarding Rs 2 lacs in lumpsum from the date of termination to date in lieu of the—Whether the amount is to be spreaded over in the said period for the purpose of income tax calculation on the —(Yes)

OBSERVED BY

O. Chinnappa Reddy and
K. Jagannathan Shetty

Hon'ble Judges, Supreme Court of India.

IN

S.L.P. No. 764 of 1987 decided on 6th May, 1987 between P. Suryanarayana, Appellant v. M/s Hindustan Aeronautics Ltd, Respondent.

TEXT

O. Chinnappa Reddy, J. Special Leave granted.

2. We think that the amount of Rs. 20,000/-awarded by the High Court was ridiculously low in the circumstances of the case. The appellant who is a Chemical Engineer was forced to seek employment as a Journalist because of the action of the respondent Having regard to the facts and circumstances we think that a sum of Rs. 2 lacs may reasonably be awarded. This amount should be paid to the appellant within three months from today. This amount should be spreaded over from the date of termination up to date. The relief may be given as provided by Section 89 of the Income Tax Act read with Rule 21A of the Income Tax Rules. Respondent is directed to pay the Court Fee.

The appeal is disposed of accordingly with no order as to costs.

Application dismissed.

Report No. 66, P. 02

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

O. Chinnappa Reddy
Judge
Supreme Court of India

OBSERVATION

'hysically handicapped—Having announced determination to rehabilitate physi- handicapped persons, by reserving post for them in all the services of the rnment, the Government can not create needless hurdles by contending that such ation cannot be made in State Civil Service (Executive Branch).

OBSERVED BY

O. Chinnappa Reddy and
V. Khalid

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 4460 of 1986 decided on 12 th December, 1986, between Ram Tripathi, Appellant, v. State of U. P. and another, Respondents.

TEXT

Chinnappa Reddy, J. Special leave ed.

. The appellant is a physically icapped person. He has an ortho- c problem. He suffers from a anent impediment of the leg, the of an old compound fracture. mpediment did not prevent him good academic performance. He further. He appeared at the com- State Services Examination held bruary, 1982 by the Uttar Pradesh c Service Commission. According advertisement issued by Commis- one post in the Provincial Civil ce (Executive Branch) was reserved andicapped person. However, the lant was offered the post of Mana- Marketting and Economic Survey d of a post in the Provincial Civil ce (Executive Branch). He was not offered a post in the Provincial Civil Service (Executive Branch) on the ground that the reservation of 2% in the Uttar Pradesh Civil Services for physically handicapped persons had been revoked by the State Government by their letter dated 1.3.1979 in regard to the Provincial Civil Service (Executive Branch) Thereupon the appellant filed a Writ Petition under Article 226 of the Constitution in the Allahabad High Court. The Writ Petition was dismissed by the High Court on the ground that there was no reservation of posts for physically handicapped persons in the Provincial Civil Service (Executive Branch). The appellant has come before us under Article 136 of the Constitution.

3. As far back as 1972, the Uttar Pradesh Government by G.O. No. 43

90/66-Apptt. 4 dated July 18, 1972 announced "for the physically handicapped persons, the reservation in Government Departments were directed to follow the policy for reservation in services accordingly. Later, by G O. No. 7/4/1971-Personnel-2 dated May 20, 1978 the Government of Uttar Pradesh while affirming the reservation of 2% post for the appointment of disabled persons in all the services under the Government," defined who is a physically handicapped person was and added the following instruction:—

> "That in this context. I have to make it clear that the physical disability should not be of the nature which may cause interference in discharge of duties and obligations attached to the concerned service. Accordingly, if the service is as such that it requires continuous use of eye, then in such case reservation cannot be given to the blind persons. In the same manner if some services specifically involves the hearing faculty then no reservation can be given to the deaf persons in such services and in a service where the use of a particular organ of the body is to be used then person disabled of that particular organ cannot be given reservation in that service. On the basis of the principle every department will issue necessary orders regarding reservation for the post under their subordination."

4. It appears that there was som discussion within the department pursuant to a letter from the Public Service Commission and there was a proposal not to reserve any post for disabled persons in the Provincial Civi Services. This proposal, however, dic not result in the issuance of any G.O by the Government. But the Publi Service Commission was informed by the Government by their letter dated 1.3.1979 that none of the categories o disabled persons was suitable for appointment of the U. P. Civil Service (Executive Branch) and no reservation for disabled persons might be made in the Provincial Civil (Executive Branch) Services. A perusal of the letter dated 1.3.1979 indicates that it was confined to "recruitment on the basis of Combined State Services Examina- dated 1978". It was not intended to be an amendment of G. O. No. 43/90/66 July 18, 1972 or G. O. No 7/4/1971 dated May 20, 1978. It was not intended to depart from general rule of reservation of 2% posts in favour of disabled person in the case of the Provincial Civil Service (Executive Branch). Again in 1981 the Chief Secretary, Government of Uttar Pradesh addressed all the Secretaries to the Government, Heads of Departments and Commissioners in Uttar Pradesh pointing out that though a provision for reservation of 2% posts was also for physically handicapped persons by G. O. No. 43/90/66 dated July 18, 1972 in the services under the State Government, appointments had not been

O. Chinnappa Reddy
Judge
Supreme Court of India

nade of handicapped persons in accor-
lance with the reservation. The nece-
sity of making appointments of physi-
ally handicapped persons to the re-
erved posts was impressed upon all
he Secretaries, Heads of Department
nd Commissioners and it was parti-
ularly brought to their attention that
981 had been declared as 'the Inter-
ational Year for the Physically Hand-
capped Persons'. It was also directed
hat vacancies should be carried for-
vard and efforts should be made to
nsure that the maximum number of
hysically handicapped persons were
ppointed. In the face of this commun-
cation from the Chief Secretary, we
hink that it is now futile for the Gover-
ment to contend that the appellant
annot be appointed to the Provincial
ivil Service (Executive Branch). Having announced their determination, very rightly too in our opinion, to rehabilitate physically handicapped persons, by reserving posts for them in all the services of the Government, the Government cannot now create needless. The State Civil Service (Executive Branch) is a large enough service which can easily accommodate physically handicapped persons in suitable posts. A direction will, therefore, be issued to the Government of Uttar Pradesh to appoint the appellant to the Uttar Pradesh Civil Service (Exectuive Branch) with effect from the date on which he should have been appointed in the ordinary course. He will be entitled to all the other service benefits. He is also entitled to costs. The appeal is allowed accordingly.

Appeal allowed.

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Report No. 67, P. 04

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

E. S. Venkataramiah
Judge
Supreme Court of India

OBSERVATION

Seniority challenged after 20 years—A Government servant after 3/4 years pointment be allowed to attend the duties without any sense of insecurity.

OBSERVED BY

O. Chinnappa Reddy And E. S. Venkataramiah
Hon'ble Judges Supreme Court of India.

IN

Civil Appeal Nos. 2922-26 of 1981, decided on 30th September, 1986, between
R. Mudgal and others, Appellants, v. R. P. Singh and others, Respondents.

TEXT

/enkataramiah, J.:-Some of the offici-
who had been directly appointed as
istants in the Intelligence Bureau of
Government of India in the year
7 filed a writ petition in the year
6 in Civil Writ Petition No. 638 of
6 on the file of the High Court to
hi questioning the validity of the
ointments of certain other Assistants
the Intelligence Bureau of whom
ie had been appointed prior to 1 2.
4 and the remaining had been appo-
d or absorbed as Assistants prior to
induction of the writ petitioners
service as Assistants and also the
gnment of seniority of them over
above the petitioners in the Writ
tion. The said Writ Petition was
nissed by the learned Single Judge.
rieved by the decision of the Lear-
Single Judge, the Petitioners in the
Petition filed an appeal in the latt-
Patent Appeal No. 6 of 1978 before
ivision Bench of the High Court, the
sion Bench allowed the appeal, set aside the judgment of the learned Single Judge and held that the posts of Assistants which existed on 1.2.1954 had to be filled by persons who were eligible in terms of Paragraph 15 of the reorganisation Scheme of 1955 effective from 1.2.1954 and that there was infringement of the terms of Paragraph 15 in their cases. The Division Bench also gave some of the ancillary directions resulting in the disturbance of the seniority of the respondents who had been working in the intelligence Bureau. By the date of the said judgment the said respondents had put in more than 25 years of service as Assistants in the Intelligence Bureau Aggrieved by the decision of the Division Bench, the Union of India as well as the officials, who had been appointed prior to the date on which the writ petitioners were appointed have filed these two appeals by special leave.

2. At the outset it should be stated that it is distressing to see that cases

of this kind where the validity of the appointments of the officials who had been appointed more than 32 years, age is questioned, are still being agitated in courts of law. A Government servant who is appointed to any post ordinarily should at least after a period of 3 or 4 years of his appointment be allowed to attend to the duties attached to his post peacefully and without any sense of insecurity. It is unfortunate that in this case the officials who are appellants before this Court have been put to the necessity of defending their appointments as well as their seniority after nearly three decades. This kind of fruitless and harmful litigation should be discoraged.

The ministerial posts in the Intelligence Bureau were reorganised wtih effect from 1.2.1954 vide Ministry of Home Affairs Letter No. 40/154/49. P. III dated 17.8.1955. In accordance with the said Scheme the Ministerial Duty Posts were reorganised in to following three categories :

Category A— Administrative officer and the Assistant Director (Non-Police)

Category B— Superintendentss and Assistant Superintendents.

Category C— Assistants

All Deputy Posts in Category 'C' were required by that Scheme to be filled by Assistants or U.D. Cs, placed in charge of such posts. The posts of Assistants were classified as belonging to Grade IV in the Intelligence Bureau Service. The mode of initial constitution of Grade IV. confirmation of the existing Assistants called 'departmental candidates' at the initial stage and the future recruitment to Grade IV consisting of Assistants were regulated by Paragraphs 15 and 16 of the said scheme. The principle of fixation of seniority as laid down in the Ministry of Home Affairs Office Memorandum No. 29/1/40 Ests (s) dated 14.3.1940 was that if a vacancy arose in the cycle meant for a direct recruit, the direct recruit would rank senior to the departmental candidate even though the direct recruit joined the post after the departmental candidates had been promoted and confirmed. This principle of fixation of seniority was subsequently superseded by the Ministry of Home Affairs. Office Memorandum No. 30/44/-48- Apptts. dated 22.6.1949 which provided that the seniority would be determined on the basis of the length of service. Prior to the reorganisation which came into force with effect from 1.2.1954 the seniority of Assistants in the Intelligence Bureau was fixed on the basis of the 1946 Office Memorandum.

3. Before the reorganisation of the Intelligance Bureau the direct recruitment of Assistants in the Intelligence Bureau was made through the Employment Exchange, advertisements and by inviting applications of persons working in other Ministeries etc. The Intelligence was exempted from making recruitment to its ministerial posts through the Union Public Service Commission in accordance with the Government orders

ued from time to time. No direct ruitment was made through the iion Public Service Commission. was only after the reorganisation the ministerial posts in the Intellige- e Bureau that the Union Government s required to make direct recruitment Assistants in the ratio of 85% ough the Union Public Service mmission and 15% by promotion of D. Cs in terms of the said Scheme. e Intelligence Bureau was again empted from the purview of the iion public Service Commission since 69 and now we are told that it nducts its own examination for king recruitment of Assistants ectly.

4. The officials who were shown Respondents Nos 3 to 9, 12 to 31 42 to 49 in the Writ Petition were rking as Assistants on 1.2 1954, i.e., date of the reorganisation of the nisterial posts in the Intelligence reau, Respondent Nos. 10 and 11 the Writ Petition were appointed as ect recruits through other sources fore the Intelligence Bureau Ministe- l Reorganisation Scheme was issued 17.8.1955. Respondent Nos 32 to 50 and 51 are those officers who re promoted from the posts of D.Cs to the posts of Assistants inst 15% quota of promotees escribed in the reorgnisation scheme. e petitioners who had filed the Writ tition were, however, recruited ough the competitive examination d by the Union Public Service mmission in the year 1955 against 85% quota of direct recruitment provided for in the Scheme and they joined service in 1957. The first draft seniority list of the Assistants was issued in 1958 on the basis of length of continuous service placing the officials who were respondents to the writ petition above the petitioners therein and was duly circulated. No objections were received from the writ petitioners against the seniority assigned to them in the said seniority list. Subsequently, the seniority lists in the Grade of Assistants were again issued in 1961 and 1965 but again no objections were raised by the writ petitioners except petitioner No. 6 who ojected to the 1965 list. In 1959 the Ministry of Home Affairs issued another Office Memorandum No. 9/11/52/IPS dated 22.12.1959 in supersession of the 1949 Office Memorandum laying down the principles of fixation of seniority. Accocrding to this Memorandum, the seniority was to be fixed on the basis of the date of confirmation as against the 1949 Office Memorandum which laid down that the seniority should be fixed in accordance with the length of service. On the basis of the 1956 Office Memorandum the seniority list as maintained in the Intelligence Bureau upto 1965 was revised in March, 1968. In the revised seniority list the writ petioners became seniors to many of the Departmental Assistants (who had been impleaded as respondents) who had a longer length of service but for one reason or the other had not been confirmed in the

said post or were confirmed after the confirmation of the writ petitioners. The 1959 Office Memorandum came up for consideration before the Supreme Court in Union of India & Ors. v. M. Ravi Varma & Ors. etc. (1982) 3 SCC 992. In that decision this Court held that the Office Memorandum dated 22.12.1959 had expressly made it clear that the general principles embodied in the annexure thereto were not to have any retrospective effect and in order to put the matter beyond any pale of controversy it had been mentioned that 'hereafter the seniority of all persons appointed in the various Central Services after the date of these instructions should be determined in accordance with the general principles annexed hereto.' In accordance with the above view this Court held that the seniority of the two respondents in that case, whose seniority was in issue, had to be determined on the basis of their length of service in accordance with Office Memorandum dated 22.6.1949 and not on the basis of the date of their confirmation because they had been appointed prior to 22.12. 1969. Two of the respondents in the writ petition out of which these appeals arise, i.e. respondent Nos. 7 and 36 had also filed writ petitions in the High Court of Andhra Pradesh challenging the seniority list of Assistants in the Intelligence Bureau which had been issued is March, 1962. The Andhra Pradesh High Court by its judgment dated 11.11.1974 on the basis of the decision in Ravi Varma's case (supra) held that the seniority of respondents 7 and 36 should be fixed on basis of the 1949 office Memorandum. On the basis of the judgment in Ravi Varma's case (supra) and the decision of the High Court of Andhra Pradesh referred to above, the seniority list of the Assistants in the Intelligence Bureau was again revised for correcting the error committed earlier and a draft partial seniority list was issued on 16-6-1975 proposing to revive the earlier list dated 22-12-1958. In this seniority list the respondents in the writ petition, who were working as Assistants at the time of the reorganisation and were governed by the 1949 Office Memorandum were shown as seniors to the petitioners who had filed the writ petition in accordance with the position in the 1958 seniority list. The petitioners filed objections to the said seniority list. Their objections were not accepted and a seniority list was issued in January, 1976 showing the officials who had been impleaded as respondents in the writ petition as seniors to the petitioner in the writ petition. In the writ petition the petitioners questioned the validity of the above seniority list published in January, 1976.

5. The respondents in the writ petition raised a preliminary objection to the writ petition stating that the writ petition was liable to be dismissed on the ground of laches. Although the learned Single Judge and the Division Bench have not disposed of the

ove writ petition on the ground of
lay, we feel that in the circumstan-
s of this case the writ petition should
ve been rejected on the ground of
lay along. The first draft seniority
t of the Assistants was issued in
e year 1958 and it was duly circ-
ated amongst all the concerned offi-
ls. In that list the writ petitioners
d been shown below the respondents.
objection were received
om the petitioners against the seni-
ty list Subsequently, the seniority
ts were again issued in 1961 and
65 but again no objections were
sed by the writ petitioners, to the
iority list of 1961 but only the
titioner No. 6 in the writ petition
presented against the seniority list
1965. We have already mentioned
at the 1968 seniority list in which
e writ petitioners had been shown
ove the respondents had been
ued on a misunderstanding of the
fice Memorandum of 1959 on the
sumption that the 1949 Office Mem-
andum was not applicable to them.
e June 1975 seniority list was pre-
red having regard to the decision
Ravi Varma's case (supra) and the
cision of the High Court of Andhra
adesh in the writ petitions filed by
pondent Nos. 7 & 36 and thus the
stake that had crept into the 1968
t was rectified. Thus the list was
alised in January, 1976. The petiti-
ers who filed the writ petition sho-
l have in the ordinary course que-
oned the principle on the basis of
ich the seniority lists were being
issued from time to time from the year 1958 and the promotions which were being made on the basis of the said lists within a reasonable time. For the first time they filed the writ petition in the High Court in the year 1976 nearly 18 years after the first draft seniority list was published in the year 1958. Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the Government servant created by the writ petition filed after several years as in this case. It is essential that any one who feels aggrived by the seniority assigned to him should approach the Court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the Government servants there would also be administrative complications and difficulties. Unfortunately in this case even after nearly 32 years the dispute regarding the appointment of some of the respondents to the writ petition is still lingering in this Court. In these circumstances we consider that the High Court was wrong in rejecting the preliminary objection raised on behalf of the respondents to the writ petition on the ground of laehes. The facts of this case are more or less similar to the facts. in R S. Makashi & Ors, v. I. M. Menon & Ors. (198) 2 2 S.C.R. 69. In the said decison this Court observed at page 100 thus :

> "In these circumstances, we consider that the High Court wrong in over-ruling the pr-

> eliminary objection raised by the respondents before it, that the writ petition should be dismissed on the preliminary ground of delay and laches, isasmuch as it seeks to disrupt the vested rights regarding the seniority, rank and promotions which accrued to a large number of respondents during the period of eight years that had intervened between the passing of the impugned Resolution and the institution of the writ petition. We would accordingly hold that the challenge raised by the petitioners against the seniority Principles laid down in the Government Resolution of March 22, 1968 ought to have been rejected by the High Court on the ground of delay and laches and the writ petition in so for as it related to the prayer for quashing the said Government Resolution should have been dismissed."

7. We are in respectful agreement with the above observation.

7. We may refer here to the weighty observations made by a Constitution Bench of this Court in Maloon Lawrence Cecil D' Souza v. Union of India & Ors. (1975) Supp SCR 409, at page 413, 414 which are as follows:

> "Although security of service cannot be used as a shield agaimst administrative action for lapse of a public servant, by and large one of the essential requirements of contenment and efficiency in public services i a feeling of security. It is difficult no doubt to guarante such security in all its varie aspects, it should at least b possible to ensure that matters like one's position in th seniority list after having bee settled for once should not b liable to be reopened after laps of many years at the instanc of a party who has during th inteavening period chosen t keep quiet. Packing up ol matters like seniority after long time is likely to resul in administrative complications and difficulties. It woul therefore, appear to be in th interest of smoothness and efficiency of service that suc matters should be given a quietus after lapse of some time.'

8. We feel that in the circumstances of this case, we should not embark upon on an enquiry into th merits on the case and that the wri petition should be dismissed on th ground of laches alone.

9. We accordingly allow thes appeals, set aside the judgment of th Divisision Beuch of the High Cour and dismiss the writ petition filed i the High Court. We also direct tha all the promotions made in the Intelligence Bureau shall be reviewed i accordance with the impugned seniority list dated January 28, 1976 Ther shall be no order as to costs.

Appeal allowed.

A. P .Sen
Judge
Supreme Court of India

OBSERVATION

Age determination—In calculating a person's age, the date of his birth must be tended as a whole day and he attains the specified age on the day preceding the iversay of his birth day.

OBSERVED BY

A P. Sen and
B.C. Ray

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 531 of 1986, decided on 28th August, 1986 between Prabhu al Sharma, Appellant, v. State of Rajasthan and another, Respondents.

TEXT

Sen, J. The short point involved in appeal by special leave pertains to determination of age at a particular nt of time. The question is whether appellant having his date of birth as uary 2, 1956 had attained the age of ears on January 1, 1984 and was efore disqualified form being coned for direct recruitment to the asthan Administrative Service under 1-B of the Rajasthan State & Subortate Services (Direct Recruitment by npetitive Examination) Rules, 1962 short 'the Rules').

2. But very briefly the essential s are these. The Rajasthan Public vice Commission invited applications direct recruitment to the Rajasthan ninistrative Service and allied Servi- of the Government of Rajasthan by ompetitive examination to be held in 3. Under the directions issued by Commission, the minimum age presled for candidates was 21 years and the maximum 28 years. It was prescribed that the candidate should have attained the age of 21 years on January 1, 1984 and should not have attained the age of 28 years i.e. on the first day of January next following the last date fixed for receipt of application. The appellant was allowed to appear in the written examination, but by an order dated June 12, 1984, the Asststant Secretary to the Commission intimated the appellant that his candidature was rejected on the ground that he had attained the age of 28 years on January 1, 1985 and was therefore ineligible for consideration. Feeling aggrieved, the appellant moved the High Court under Art. 226 of the Constitution and contended that his date of birth was January 2, 1956 and that he had not attained the age of 28 years on January 1, 1984. His claim was contested by the respondents who pleaded that the appellant had attained the age of 28 years on

January 1, 1984 and therefore his form was properly rejected. During the pendency of the writ petition, the High Court by an interim order dated September 14, 1984 directed the Commission to interview the appellant if he was otherwise eligible for being considered except on the ground of age. The appellant was accordingly interviewed but the result was withheld. A learned Single Judge by his judgment and order dated January 19, 1985 held that if the date of birth of the appellant was January 2, 1956 he would complete the age of 28 years only at the end of the day on January 1, 1984 and therefore he could not be said to have attained the age of 28 years on that date. He accordingly held that the Commission was not justified in rejecting the candidature of the appellant on the ground that he had attained the age of 28 years on Januray 1, 1984 and therefore was not eligible for consideration

2. On appeal, a Division Bench disagreed with the view expressed by the learned Single Judge and reversed his judgment on the ground that the words used in R. 11-B of the Rules are 'must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application' and not that he should have completed the age of 28 years on that day. They relied upon the undisputed fact that the first day of January next following the last date fixed for receipt of application in this case was January 1, 1984 Accordingly, they held that the appellant was born on January 2, 1956 and, as such, he had attained the age of 28 years as soon as the first day of January, 1984 commenced. They further held that the appellant had not only attained the age of 28 years, but had also completed the same at 12 o' clock in the midnight of January 1, 1984. According to the learned Judges, on January 2, 1984, the appellant would be one day more than 28 years and, as such he was disqualified to appear at the examination under R. 11-B of the rules. The conclusion of the learned Judges may best be stated in their own words :

> "In calculating a person's age the day of his birth must be counted as a whole day and he attains the specified age on the day preceding anniversary of his birth day".

3. In coming to that conclusion the learned Judges relied upon the language of R 11-B of the Rules which prescribes the age limit for the said examination and also referred to S. 4 of the Indian Majority Act 1875. They have relied on certain decisions of different High Courts, particularly to that in G. Vatsala Rani represented by guardian and father, P.M G. Kini v. Selection Committee for Admission to Medical College, Bangalore-2, represented by the secretary AIR 1967 Mysore 135, and to some English decisions laying down the principle for determination of age.

4. It is argued that the learned Judges were in error in introducing the legal concept of the age of majority as laid down in S. 4 of the Indian Majority Act, 1875 for the purpose of interpreting

11B. It is said that the purpose of r. 1B. framed by the Government was to escrible the minimum and maximum ge limits for entry into the Rajasthan dministrative Service and allied servic- of the Government of Rajasthan. It is bmitted that as commonly understood person attains a particular age after has completed a given number of ye- s. It is said that there is no reason hy the words of R. 11B 'must have att- ned the age of 21 years and must not ve attained the age of 28 years' shou- not be understood in the ordinary nce. At first blush, the contention ad- nced appears to be rather attractive t on deeper consideration it cannot evail.

5. Learned counsel for the appe- nt drew our attention to the fact that e Union Public Service Commission s been interpreting the words 'must ve attained the age of 21 years and ust not have attained the of 26 ars on the first day of August next llowing' in the way the appellant co- ends for. These words are taken from 4 of the Indian Administrative Ser ce (Appointment by Competitive Exa- ination) Regulations, 1955 framed by e Central Government in pursuance R. 7 of the Indian Adminstrative Ser- ce (Recruitment) Rules, 1954, Presum- ly, there would be similar provisions ying down the qualification as to age other central services as well. R. 4 in- far as material reads :

> "4. Conditions of Eligibility-In order to be eligible to compete at the examination, a candidate must satisfy the following conditions, namely :
>
> (i) X X X X X
>
> (ii) Age—He must have attained the age of 21, and not attained the age of 28 on the first day of August of the year in which the examination is held :
>
> Provided that the upper age limit may be relaxed in respect of such categories of persons as may from time to time, be notified in this behalf by the Central Government to the extent and subject to the conditions notified in respect of each category."

6. Undoutedly, the Union Public Service Commission has been interpreting the provision as to attainment of age in a like manner. This would be clear from the advertisement issued by it on December 8, 1984 which is in these terms :

> "Age limit : (ka) The candidate should have attained the age of 21 years on 1 st August 1985, but should not have attained the age of 26 years, that is he should not have born before the 2nd August, 1959 and after the 1 st August, 1964."

We are afraid, the interpretation of R. 11B. of the Rules cannot proceed upon the basis adopted by the Union Public Service Commission.

Rule 11B. of the Rules provides :

A. P. Sen
Judge
Snpreme Court of India

> "11B, Age, Notwithstanding anything contained regarding age limit in any of the service Rules governing through the agency of the Commission to the posts in the State Service and in the Subordinated Service mentioned in Schedule I and in Schedule II respectively, a candidate for direct recruitment to the posts to be filled in by combined competitive examinations conducted by the Commission under these Rules must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application."

It is plain upon the language of R. 11B that a candidate 'must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application.' Last day fixed for receipt of application in this case, was January I, 1983. First day of January next following that day would be January I, 1984. The object and intent in making R. 11B was to prescribe the age limits upon which the eligility of a candidate for direct recruitment to the Rajasthan Administrative Service and other allied services is governed. At first impression, it may seem that a person born on January 2, 1956 would attain 28 years of age only on January 2, 1984 and not on January 1, 1984, but this is not quite accurtae. In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding, the anniversary of his birth day. We have to apply well accepted rules for computation of time. One such rule is that fractions of a day will be omitted in computing a period of time in years or months in the sense that a fraction of a day will be treated as a full day. A legal day commences at 12 o'clock midnight and continues until the same hour the following night There is a popular misconception that a person does attain a particular age unless and until he has completed a given number of years In the absence of any express provision, it is well-settled that any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birth day.

7. In Halsbury's Laws of England 3rd edn., vol. 37, Para 178 at p.100. the law was stared thus :

> In computing a period of time, at any rate, when counted in years or months, on regard is generally paid to fractions of a day, in the sense that the period is regarded as complete although it is short to the extent of a fraction of a day...........

Similarly, in calculating a person's age the day of his birth counts as a whole day, and he attains a specified age on the day next before the anniversary of his rth day."

8. We have come across two glish decisions on the point. In x v. Scoffin, LR (1930) 1 KB 741, e question was whether the accused d or had not completed 21 years age. S. 10 (1) of a Criminal Just- Administration Act, 1914 provides t a person might be sent to Bors- if it appears to the court that he not more than 21 years of age. The cused was born on February 17, 09. Lord Hewart, CJ. held that the cused completed 21 years of age on bruary 16, 1930 and he was one more than 21 years of age on Feb- ry 17, 1930 which was the Commi on day of Manchester Assizes.

9. In Re. Shurey, Savory v. Shu- , LR (1918) 1 Ch. 963, the ques- n that arose for decision was this : es a person attain a specified age aw on the anniversary or his or birthday, or on the day preceding t anniversary? After reviewing the lier decisions, Sargant, J. said that does not take cognizance of part a day and the consequence is that son attains the age of twenty one years of twenty-five years, or any specified , on the day preceding the annive- y of his twenty-first or twenty-fifth hday or other birthday, as the case y be.

10. From Halsbury's Laws of gland, 4th edn., vol. 45, para 1143 . 550 it appears that s 9 of the nily Law Reforms Act, 1969 has ogated the old common law rule ed in re. Shurey, Savary v. Shurey (supra).

11. It is in recognition of the difference between how a person's age is legally construed and how it is understood in common parlance. The Legislature has expressly provided in s. 4 of the Indian Majority Act, 1875 that how the age of majority is to be computed. It reads :

> "4. Age of majority how computed—
>
> In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of s. 3, at the beginning of the twenty first anniversary of that day, and if he falls within the second paragraph of S. 3, at the beginning of the 18th anniversary of that day."

The Section embodies that in computing the age of any person, the day on which he was born is to be included as a whole day and he must be deemed to have attained majority at the beginning of the eighteenth anniversary of that day. As already stated, a legal day commences at 12 o' clock midnight and continues until the same hour the following night. It would therefore appear that the appellant having been born on. January 2, 1956, he had not only attained the age of 28 years but also completed the same at 12 o' clock on the midnight of January 1, 1984. On the next day i.e. on January

2, 1984, the appellant would be one day more than 28 years. The learned Judges were therefore right in holding that the appellant was disqualified for direct recruitment to the Rajasthan Administrative Service and as such was not entitled to appear at the examination held by the Rajasthan Public Service Commission in 1983. We affirm the view taken by the learned Judges as also the decision in G. Vatsala Rani's case, supra

12. It is rather unfortunate that the appellant should upon the construction placed on R. 11B of the Rajasthan State & Subordinate Service (Direct Reecruitment by competitive Examination) Rules, 1967 fail to secure entry into the Rajasthan Administrative Service and allied services of the Government of Rajasthan merely because
exceeds the upper age limit just
one day. The Government ought
consider the question of relaxing th
upper age limit in the case of the a
pellant in order to mitigate the har
ship, if otherwise permissible. Ther
is need for a provision like the provis
to R. 4 of the Indian Administrati
Service (Appointment by Competiti
Examination) Regulations, 1955, con
ferring the power of relaxation on th
State Government under certain con
ditions without which a deserving ca
didate would be rendered ineligible fo
appointment.

13. The result is that the appea
must fail and is accordingly dismisse
There shall be no order as to costs.

Appeal dismissed.

V. Khalid
Judge
Supreme Court of India

OBSERVATION

Termination—Absent from service—Without considering the position in the depu- foreign service, the service conditions there, his position there etc. is not justified.

OBSERVED BY

V. Khalid and G. L Oza

Hon'ble Judges Supreme Court of India.

IN

W.P. No. 3832 of 1978 decided on 19th September, 1986, between V. Sriddharan r, Petitioner v. State of Kerala and others, Respondents.

TEXT

Khalid, J. The petitioner was a oratory Attendant in the University ermediate College (now called Arts llege), Trivandrum in the Collegiate ucation Department. He was deputed the City Improvement Trust as per vernment Order dated 24.10.61. The iod of deputation was two years from date of the Order or from the date his relief from the College. He was eved of his duties with effect from 10.61, by the Department of Colle- te Education. His deputation period s extended for a further period of e year from 1.11.63 and for a further riod of two years with effect from 1.64. The extended period expired 31.10.66. In the last order extending period of deputation, it was made ar that no further extension would allowed.

2. During the deputation period was promoted as Upper Division erk in the City Improvement Trust. e Petitioner made a representation on 3.9.66., requesting the State Government to allow him to continue in the City Improvement Trust, terminating his lien in the Collegiate Education Department. No orders were passed by the Directorate of Collegiate Education or by the Government on this representation.

3. The petitioner continued in the City Improvement Trust, on deputation. Meanwhile the City Improvement Trust was merged with the Kerala State Housing Board, respondent No. 3 herein. While so, on 29.3.72, orders were passed terminating the lien of the petitioner in the Department of Collegiate Education in purported exercise of the powers contained in Rule 24 of the Kerala Service Rules. A show cause notice was issued by the Director of Collegiate Education on 21.3.1973, asking the petitioner to submit his explanation against the proposed removal of his lien in that department. The petitioner submitted a representation dated 26.3.1973, stating

that he was not at fault in not joining duty in the parent department and that he was ratained in foreign service anticipating Governmen's orders. In view of the merger of the City Improvement Trust with the Kerala Housing Board, he was not interested in continuing on deputation. He further requested that the period after 1-11-1966, may be treated as an extension of the deputation period. The explanation was not accepted and orders were finally passed terminating the lien of the petition.

4. It is necessary to state a few facts to understand what happened after the petitioner's deputation. The petitioner thought that he was secure in the deputed service and that he would stand to gain therein if he continued there when compared to his parent department He had challenged the order passed by the Director of Collegiate Education terminating his lien by filing Original Petition No. 3779 of 1973 in the Kerala High Court. Earlier he had filed an Original Petition No. 31 of 1973 in the same High Court against the State of Kerala and the Kerala State Housing Board when he reverted from the post of Upper Division Clerk to that of Lower Division Clerk in the Housing Board, far not passing the Accounts Test. He succeeded in this writ petition. He appears to have been nnduly elated over this success and allowed the original petition No. 3779 to be dismissed as not pressed. The main ground why he did not press the original petition No. 3779 of 1973 was that he had obtained a favourable order in the othe original petition. As ill-luck woul have it, the matter was taken in appea by the State Housing Board and th Division Bench of the Kerala Hig Court reveresed that judgment. Thus the petitioner was victim of unfavourable circumstances and fluctuations i fortunes.

5. Normally we would have dismissed this writ petition on the shor ground that the petitioner had invoked the jurisdiction of the High Court under Article 226 of the Constitution to get the order under challenge in this writ petition to be pushed, and after invoking this jurisdiction had allowed the original petition, wherein the said challenge was made, to be dismissed as not pressed. But, as indicated above, the petitioner at that time did not anticipate what was in store for him in future.

6. It was as per a Government order that he was deputed on foreign service It is true that when the deputation was extended, it was made clear that the deputation would expire on 31-10-1966 finally. The petitioner was put on notice that there would not be any further extension. There was some indifference on his part. But, there was greater in-action on the part of the respondent also. The petitioner, had made a respresentation on 3-9-1966 to the respondents on which no orders were passed till 29-3-1972 When the petitioners realised that his prospects

were not bright in the Kerala State Housing Board as he anticipated earlier he was left with no option put to press his case that the order terminating his lien was bad in law. We do not think that the petitioner should be faulted for this in-action when we fined that the respondents also contributed in a large measure to the unhappy State of affairs.

7. Rule 19 (a) in part I, Chapter III of the Kerala Service Rules reads as follows:

> "An officer's lien on a post may in no circumstances be terminated even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post."

This rule mandates that an officer's lien on a post shall not be terminated even with his consent if the consequence is to leave him without a lien or a suspended lien upon a permanent post. The State of Kerala, The Director of Collegiate Education and the Kerala State Housing Board are parties to writ petition. None of these parties have filed counter affidavits We do not know the service conditions of the petitioner in the Housing Board. We do not know whether he oceupies a permanent post there or not. Nor do we know whether he has a lien or a surpended lien in the Housing Board. Without being apprised of these details, the order of termination of lien cannot be allowed to stand as it would work great injustice against the petitioner Rule 24 of the Kerala Service Rules is the next rule which is attracted in this case, which reads as follows:

> "Unless the Government, in view of the special circumstances of the case, otherwise determine, after five years' continuous absence from duty, an officer shall be removed from service after following the procedure laid down in the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960."

This rule speaks of removal from service when an officer has been continuously absent from duty for five years. This rule speaks of the existence of special circumstances which will enable the department concerned to save an officer from its vice. This rule also speaks of the necessity to follow the procedure laid down in the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960, for removal of an officer from service The assumption on the part of the department in this case is that the petitioner's continuance in the service of the Housing Board constituted absence from duty. We cannot subscribe to this view in the absence of compelling materials. It was not a case of his absenting from duty after he was asked by the parent department to join it. At no time was he asked to join duty in the parent department Without sperific orders, the petitioner could not abendon the deputed foreign service and join the parent department. There should be a clear finding of continuous absence from duty by the deprtment to attract Rule 24. The department also has to satisfy the Court whether the special circumstances of this case would not rescue the petitioner from the rigour or Rule 4. It is also necessary for this Court to be satisfied that the procedure laid down in the Kerala Civil Services (Classification Control and Appeal) Rules, 1960, is complied with. The order terminating his lien is passed on the specious plea that his explanation is not satisfactory. The order should have been more articulate in its content. To snstain the order would virtually mean to deny the petitioner his service in the parent department and throwing him to the mercies of the Housing Board.

8. In this case, we are concerned more with consideration of justice than with more technicalities of law. The petitioner has filed this writ petition as early as in 1978. It would be unfair and unjust to treat the period after 31. 10.1966 to be one of continuous absence from duty. For an effective adjudication of the claim of the petitioner, his position in the deputed foreign service, the service conditions there, his position there, etc., will have to be considered in detail. That has not been done. Under these circumstances, we hold that the petitioner is entitled to succeed. Accordingly, we quash the order No. B. 5-38127/66 dated 29th May, 1973, issued by the Director of Collegiate Education, Trivandrum, terminating the lien of the petitioner herein and direct the second respondent to issue a fresh show cause notice, give the petitioner an opportunity to make his explanation and also an opportunity of being heard and pass orders strictly in compliance with Rule 19 (a) and Rule 24 of the Kerala Service Rules and in accordance with law, if the second respondent still feels that his lien should be terminated.

Petition allowed.

M.P. Thakkar
Judge
Supreme Court of India

OBSERVATION

Termination—Rule or regulation framed by a public sector undertaking empowering the employer to terminate the services of an employee by giving notice of the prescribed period or payment of salary in lieu there of is unconstitutional.

OBSERVED BY

M.P.Thakkar and
S. Natarajan
Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No 1969 of 1986 decided on 26th September, 1986, between O.P. Bhandari, Appellant v. Indian Tourism Development Corporation Ltd. & Ors. Respondents.

TEXT

Thakkar, J. A—CAT—scan of this appeal reveals three problems, viz—

I. Whether a rule or regulation framed by a public sector undertaking which is an authority under the control of Government of India is a 'State' within the parameters of Article 12 of the Constitution of India empowering the employer to terminate the services of an employee by giving notice or the prescribed period or payment of salary for the notice period in lieu of such notice is constitutional ?

II. If it is unconstitutional, whether the employee whose services are terminated under the said rule or regulation is always and invariably entitled to reinstatement? Whether option to pay compensation in lieu of reinstatement can be given to the employer in fit cases?

III. What would be the appropriate amount to the be reasonably awarded in lieu of reinstatement?

2. These are the questions which call for answers in this appeal.

3. Undisputed, are the following facts, the same being incapable of being disputed.

(1) The respondent Corporation (I.T.D.C.) is 'State' whithin the parameters of Article 12 of the Constitution of India it being an instrumentality of the State as per the law enuncited by this Court in Central Inland Water Transport Corporation Limited & Anr. v. Brojo Nath Ganguly and Anr. and Central Inland Water Transport Corporation Limited and Anr. v. Tarun Kanti Sengupta and

Anr.

(2) Appellant was an employee of the Respondent Corporation holding the post of Hotel Ranjit, New Delhi, at the material time when his services were terminated by the impugned order.

(3) Services of the Appellant were terminated in exercise of powers under Rule 31 (v) of the ITDC Conduct Discipline and Appeal Rules 1978, (ITDC) rules by giving pay for 3 months in lieu of 3 months' notice under the said rule.

4. Rule 31 (v) of the I. T. D. C. Rules, the constitutional validity of which is questioned from the platform of Articles 14 and 16 (1) of the Constitution of India, provides:

"31 Termination of services the services of an employee may be terminated by giving such notice or notice pay as may be prescribed in the contract of service in the following manner-

(i) XX XX XX
(ii) XX XX XX
(iii) XX XX XX
(iv) XX XX XX
(v) XX XX XX

(v) of an employee who completed his probationary period and who has been confirmed or deemed to be confirmed by giving him 90 days' notice or pay in lieu thereof.

this rule cannot co-exist with ofticles 14 and 16 (1) of the Constitution of India. The said rule must therefore, so that the fundamental rights guaranteed by the aforesaid constitutional provisions remain alive. For, otherwise, the guarantee enshrined in Articles 14 and 16 of the Constitution can be set at naught simply by framing a rule authorizing termination of an employee by merely giving a notice. In order to uphold the valiadity of the rule in question it wlll have to be held that the renure of service of a citizen who takes up employment with the State will depend on the pleasure or whim of the competent authority unguided by any principle or policy, and that the services of an employee can be terminated even though there is no rational ground for doing so, even arbitrarily or capriciously. To uphold this right is to accord a "magna carta" to the authorities invested with these powers to practise uncontrolled discrimination at their pleasure and caprice on, considerations not necessarily based on the welfare of the organisation but possibly based on personal likes and dislikes, personal preferences and prejudices. An employee may be retained solely on the ground that he is a sycophant and iudulges in flattery, whereas the services of one who is meritorious (but who is wanting in the art of sycopancy and temperamentally incapable of indulging in flattery may be terminated. The power may be exercised even on the unarticulated ground that the former belongs to the same religious faith or is

M. P. Thakkar
Judge
Supreme Court of India

disciple of the same religious te-
er or holds opinions congenial to
. The power may be exercised
ending on whether or not the con-
ied employee belongs to the same
on, or to the same caste as that
the authority exercising the power,
course without saying so. Such
ver may be exercised even in order
make way for another employee
is a favourite of the concerned
hority. Provincialism, casteism, ne-
ism, religious fanatism, and several
er obnoxious factors may in that
freely operate on the mind of the
npetent authority in deciding whom
retain and whom to get rid of.
these dangers are not imaginary
s. They are very much real in
anisations where there is a conflu-
e of employees streaming in from
ferent states. Such a rule is cap-
of robbing an employee of his
nity & making him a supine per-
whose destiny is at the mercy
the concerned authority (whom he
st humour) notwithstanding the co-
utional guarantee enshrined in Art-
s 14 and 16 of the Constitution
India. To hold otherwise is to
d that the fundamental right em-
lded in Articles 14 and 16 (1) is
mere paper tiger and that it is so
ereal that it can be nullified or
hewed by a simple device of fra-
ng a rule which anthorizes termi-
tion of the service of an employee
merely giving a notice of termi-
tion. Under the circumstances the
e in question must be held to be unconstitutional and void. This Court has struck down similar rule in similar situations. In State Electricity Board v. D.B. Ghosh (1985) 2 CR 1014, Chinnappa Reddy J. speaking for a three Judge Bench of this Court has observed that a (similar) regulation authorizing the termination of the services of a permanent employee, by serving three months' notice or on payment of salary for the corresponding period in lieu thereof, was exfacie 'totally arbitray' and capable of vicious discrimination,' And that it was a naked hire and Fire rule and parallel of which was to be found only in the "Henary VIII clause" which deserved to be banished altogether from employer employee relationship. The regulation thus offended Article 14 of the Constitution of India and deserved to be struck down on that account. In Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Another and Central Inland Water Transport Corporation Limited and Anr. v. Tarun Kanti Sengupta and Anr. (Supra) a Division Bench of this Court has struck down a similar rules in so far as it authorized termination or employment by serving a notice thereunder as being violative of article 14 of the Constitution of India, inter alia, in as much as it was capable of being selectively applied in a vicious manner by recourse to 'pick and choose' formula.

5. There is, under the circumstances, no escape from the conclusion that Rule 31 (v) of the aforesaid IIDC rules which provides for termination of

the services of the employees of the respondent corporation simply by giving 90 days' notice or by payment of salary for the notice period in lieu of such notice, deserves to be quashed. As the occasion so demands, we feel constrained in place in focus and highlight an important dimension of the matter. The impugned regulation is extremely wide in its coverage in the sense that it embraces the 'blue collar' workmen, the 'white collar' employees, as also the 'gold collar' (managerial cadre) employees of the Undertaking. In so far as the 'blue collar' and 'white collar' employees are concerned, the quashing does not pose any problem. In so far as the 'gold collar, (managerial cadre) employees are concerned, the consequence of quashing of the regulation calls some reflection. In the private sector, the managerial cadre of employees is altogether excluded from the purview of the Industrial Disputes Act and similar labour legislations. The private sector can cut the dead wood and can get rid of a managerial cadre employee in case he is considered to be wanting in performance or in integrity Not so the public sector under a rule similar to the impugned rule. Public sector undertakings may under the circumstances be expored to irreversible damage at the hands of a 'gold collar'. employee (belonging to a high managerial cadre) on account of the faulty policy decisions or on account of lack of efficiency or probity of such an employee. The very existence of the undertaking may be endangered beyond recall. Neither the cap
talist world nor the communist worl
(where an employee has to face a deat
sentence if a charge of corruption
established) feels handicapped or hel
less and countenances such situatio
Not being able to perform as per ex
pectation or failure to rise to the ex
pectations or failure to measure up t
the demands of the office is not mis
conduct. Such an employee cann
thus be replaced at all. If this situatio
were to be tolerated by an undertakin
merely because it belongs to the publi
sector, it would be most unfortunat
not only for undertaking but als
for the Nation The public sector is pe
ched an the commanding heights of th
National Economy. Failure of the pub
lic sector might well wreck the Nati
onal Economy. On the other hand th
success of the public sector means pro
sperity for the collective communit
(and not for an individual Industria
House). The profits it makes in on
unit can enable it to run a losing uni
as also to develop or expand the ex
isting units and start new units so a
to generate more employment and pro
duct more goods and services for th
community. The public sector nee
not therefore be encumbered with un
necessary shackles or made lame. I
is wondered whether such a situatio
can be remedied by enacting a regula
tion permitting the termination of th
employment of employee belonging t
higher managerial cadre, if the under
taking has reason to believe that hi
performance is unsatisfactor

or inadequate, or there is a bonafide suspicion about his integrity, these being factors which cannot be called into aid to subject him to a disciplinary proceeding. If termination is made, under such a rule or regulation, perhaps it may not attract the vice of arbitrariness or discrimination condemned by Articles 14 and 16(1) of the Constitution of India, in as much as the factor operating in the case of such an employee will place him in a class by himself and the classification would have sufficient nexus with the object sought to be achieved. Of course it is for the concerned authorities to tackle the sensitive problem after due deliberation. We need say no more.

6. Time is now ripe to turn to the next question as to whether it is obligatory to direct reinstatement when the concerned regulation is found to be void. In the sphere of employer-employee relations in Public Sector Under takings, to which Article 12 of the Constitution of India is attracted, it cannot be posted that reinstatment must invariable follow as a consequence of holding that an order of termination of service of an employee is void. No doubt in regard to 'blue collar' workmen and 'white collar' employees other than those belonging to the managerial or similar high level cadre, reinstatement would be a rule. and compensation in lieu thereof a rare exception. Is so far as the high level managerial cadre is concerned, the matter deserves to be viewed from an altogether different perspective a larger perspective which mnst take in to account the demands or National Interest and the resultant compulsion to ensure the success of the public sector in its competitive co-existence with the private sector. The public sector can never fulfil its life-aim or successfully view with the private sector if it is not managed by capable efficient personnel with unimpeachable iategrity and the requisite vision who enjoy the fullest confidence of the 'policy makers' of such undertakings. Then and then only can public sector undertaking achieve the goals of.

(1) maximum production for the benefit of the community,
(2) social justice for workers, consumers and the people, and
(3) reasonable return on the public funds invested in the undertaking.

7. It is in public interest that such undertakings or their Board of Directors are not compelled and obliged to entrust their managements to personnel in whom, on reasonable grounds, they have no trust or faith and with whom they are in a bonafide manner unable to function harmoniously as a team working arm-in-arm with success in the aforesaid three dimensional sense of their common goal. These factors have to be taken into account by the Court at the time of passing the consequential order, for the Court has full discretion in the matter of granting rlief, and the Court can sculpture the relief to suit the needs of the matter at hand. The Court, if satisfied

that ends of justice so demand, can certainly direct that the employer shall have the option not to reinstate provided the employer pays reasonable compensation as indicated by the Court.

8. So for as the facts of this case are concerned, we are satisfied that this is a fit case for granting compensation in lieu of reinstatement, instead of granting 'reinstatement'. For, it cannot be said that the apprehension voiced by the respondent Cooperation as regards the negative consequences of reinstatement is unreasonable. We do not propose to pronounce on the validity or otherwise of the allegations and counter allegations made by the parties in their respective affidavits. Suffice it to say that the relations between the parties appear to have been strained beyond the point of no return. The Trade Union of the employees has lodged a strong protest and even held out a threat of strike, in the context of some acts of the Appellant. Such unrest among the workmen is likely to have a prejudicial effect on the working of the undertaking which would prima facie be detrimental to the large National interest not to speak to detriment to the interest of concerned undertaking. We are not impressed by the submission that the Union is virtually and 'company's Union'. In any case such disputed questions of facts cannot be resolved in this forum. We are prima facie satisfied that the apprehension is not ill founded. What is more, reinstatement is perhaps not even in the interest of the appellant as he cannot give his best in the less than cordial atmosphere and it will also result in misery to him. let alone the other side Neither the undertaking nor the appellant can improve their image or performance, or, achieve success. In fact it appears to us that both sides will be unhappy and miserable. These are valid reasons for concluding that compensation in lieu of reinstatement, and not reinstatement, is warranted in the circumstances of the present case.

9. Counsel for the appellant having forcefully pressed the claim for reinstatement, has contended that in case the Court is disinclined to order reinstatement, the appellant ought to be awarded the full salary and allowances which would have accrued to him till the date of his superannuation which is more than 8 yeas away. We think it would be unreasonable to award 8 years salary and allowances, as lump sum compensation in lieu of reinstatement. We consider it unreasonable because—

(i) To do so would tantamount to paying to the appellant. Every Month 20% Over and Above what he would have earned if he was continued in the service Without Doing Any work as the lump sum payment of 8 years' salary invested at 15% interest (it being the current rate of interest(would yield a monthly recurring amount equivalent to his current monthly salary 'plus' 20%.

(ii) To do so would be tantamount

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M. P. Thakkar
Judge
Supreme Court of India

to paying to him his present salary etc. plus 20% more even month not only till his date of retirement but till his death (if he lives longer) and also to his heirs thereafter, in Perpetuity.

(iii) Besides, the corpus of the lumpsum amount so paid as compensation would remain with him intact.

Obvious it is, therefore, that the urt would be conferring a 'bonanza' him and not compensating him by epting this formula. The submission, ordingly deserves to be repelled hesitatingly.

10. In our considered opinion, npensation equivalent to 3.33 years, ary (including allowances as admissi-) on the basis of the last pay and owances drawn by the appellant uld be a reasonable amount to award lieu of reinstatement taking into ount the following factors viz.—

(1) The corpus if invested at the prevailing rate of interest (15%) will yield 50% of the annual salary and allowances. In other words every year he will get 50% of what he would have earned by way of salary and allowance with four additional advantages :

(i) He will be getting this amount without working.

(ii) He can work somewhere else and can earn annually whatever he is worth over and above, getting 50% of the salary he would have earned.

(iii) If he had been reinstated he would have earned the salary only upto the date of superannuation (upto 55, 58 or 60 as the case may be) unless he died earlier. As against this 50% he would be getting annually he would get not only beyond the date of superannuation, for his lifetime (if **he** lives longer), but even his **heirs** would get it in perpetuity **after** his demise.

(iv) The corpus of lumpsum compensation would remain intact, in any event.

No doubt he will not have the advantage of further promotion, but then what are his prospects, given the present relationship ? Besides, the chances of promotion can be set off against the risk of a departmental disciplinary proceeding. Factors (i), (ii), (iii) and (iv) are of such great significance that compensation on the basis of 50% of his annual salary and allowances is much more to his advantage, we are thus satisfied that compensation in lieu of reinstatement on the aforesaid basis is more than reasonable. We therefore, direct that...

I. The Respondent Corporation shall reinstate the appellant with full back-wages (including usual allowances), or, at its option,

II. The Respondent Corporation shall pay to the appellant—

(1) Salary including usual allowances for the period commencing from the date of termination of his service under the impugned order till the date of payment of compensation equivalent to 3.33 years' salary including usual allowances to him.

(2) Provident Fund amount payable to the appellant and retirement benefits computed as on the date of payment as per clause I shall be paid to him within 3 months for the said date.

III. The appellant shall vacate and make over prossession of the premises provided to the appellant by the respondent company before the expiry of 3 months from the date of this order or within one month of the day on which payment under clause II is made, whichever is later.

iv. Respondent shall pay the costs to the Appellant.

v. Interim order shall stand vacated subject to the direction embodied in Clause III.

vi. Since the amount is being paid in one lump sum, it is likely that the employer may take recourse to Section 192 of the Income tex Act, 1961 which provides that any person responsible for paying any income chargeable under the head 'Salaries' shall, at th time of payment deduct incom tax on the amount payable a the average rate of incom computed on the basis of th rates in force for the financia year in which the payment i made, on the estimated incom of the assessee under this hea for the financial year. If, therefore, the employer proceeds t deduct Income-tax as provide by Section 192, we would like t make it abandantly clear tha the appellant would be entitle to relief under Section 89 of the Income-tax Act which provides that where by reason of any portion of assessee's salary being paid in arrears or i advance by reason of his having received in any one financial year salary for more than 12 months or a payment which under the provisions of clause (3) of Section 17 is a profit in lieu of salary, his income is assessed at a higher rate than that it would otherwise have been assessed, the Income tax Officer shall on an application made to him in this behalf grant such relief as may be prescribed. The prescribed relief is set out in Rule 21-A of the Income tax Rules. The appellant is entitled to relief under Section 89 because compensation herein awarded includes salary which has been in arrears as also the compensation in lieu of reinstatement and the relief should be given as provided by Section 89 of the Income-tax Act read with Rule 21-A of the Income tax Rules. The appellant is indisputably entitled to the same. If any application is required to be made, the appellant may submit the same to the competent authority and the Corporation shall, through its Tax Consultant, assist the appellant for obtaining the relief.

The appeal is allowed. The order of the High Court is set aside. Order in the aforesaid terms is passed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

Report No. 72, p. 01

Rangnath Misra,
Judge
Supreme Court of India

OBSERVATION

(A) Constitution of India—Articles 323A, 226 and 227—Administrative Tribunals Act, 1985—Section 28—Whether the exclusion of the jurisdiction of the High Court in service matters and vesting of exclusive jurisdiction in such service matters in the Administrative Tribunals is unconstitutional and void—Consideration what.

(B) Administrative Tribunals Act, 1985—Section 6(1) (c) and 8—Qualifications for appointment of Chairman and Vice Chairman, and procedure and period for the appointment of Chairman, Vice Chairman and Members—Observation of Supreme Court regarding the—Hoped and trust that amendment in the Act according be brought by 31-3-1987.

OBSERVED BY

P. N. Bhagwati
R. N. Misra,
V. Khalid
G. L. Oza and
M. M. Dutt,

Hon'ble Chief Justice and Judges, Supreme Court of India.

IN

W.P. No. 12437 of 1985, 12460 of 1985 and 238 of 1986 with Transferred Case No. 9 -11/86 and 12-23/86 in Transfer Petition No. 312-320/1985, decided on 9th December, 1986, between S.P. Sampath Kumar, Petitioner Versus Union of India and others, Respondents.

TEXT

Ranganath Misra, J. The challenge raised to the vires of the Administrative Tribunals Act, 1985, (hereinafter referred to as the Act') in an application under Article 32 of the Constitution and the other connected matters has been referred to the Constitution Bench for adjudication. Indisputably the Act has been framed within the ambit of Article 323A which was brought into the Constitution by the Forty-Second Amendment Act in 1977. In exercise of power vested under Section 1 (3) of the Act, the Central Government appointed 1.11.1985 as the date from which the Act would come into force. Thereupon Sampat Kumar and others (W.P 12460 of 1985) moved this Court and the connected matter were brought before this Court or different High Courts which have since been transferred to this Court to be analogously heard. On 31-10-1985 a Division Bench of this Court gave certain interim directions including stay of transfer of the pending application under Article 32 which were liable to be transferred to the Tribunal and also for continuance of exercise of jurisdiction under Article 32 in regard to disputes covered under the Act notwithstanding the bar provided in Section 28

2. In the writ applications as presented the main challenge was to the abolition of the jurisdiction of this Court under Article 32 in respect of specified service disputes. Challenge was also raised against the taking away of the jurisdiction of the High Court under Articles 226 and 227. It was further canvassed that establishment of benches of the Tribunal at Allahabad, Bangalore, Bombay, Calcutta, Gauhati, Madras and Nagpur with the principal seat at Delhi would still prejudice the parties whose cases were already pending before the respective High Courts located at places other than these places and unless at the seat of every High Court facilities for presentation of applications and for hearing thereof were provided to the parties and their lawyers would be adversely affiected. The interim order made on October 31, 1985, made provision to meet the working difficulties. Learned Attorney General on behalf of the Central Government assured the Court that early steps would be taken to amend the law so as to save the jurisdiction under Article 32, remove other minor anomalies and set up a bench of the Tribunal at the seat of every High Court. By the Administrative Tribunals (Amendment) Ordinance, 1986, these amendments were brought about and by now an appropriate Act of Parliament has replaced the Ordinance. Most of the original grounds of attack thus do not survive and the contentions that were canvassed at the hearing by the counsel appearing for different parties are these :

(1) Judicial review is a fundamental aspect of the basic structure of our Constitution and bar of the jurisdiction of the High Court under Articles 226 and 227 as contained in Section 28 of the Act cannot be sustained;

(2) Even if the bar of jurisdiction is upheld, the Tribunal being a substitute of the High Court, its constitution and set up should be such that it would in fact function as such substitute and become an institution in which the parties could repose faith and trust;

(3) Benches of the Tribunal should not only be established at the seat of every High Court but should be available at every place where the High Courts have permanent benches;

(4) So far as Tribunals set up or to be set up by the Central or the State Governments are concerned, they should have no jurisdiction in respect of employees of the Supreme Court or members of the subordinate judiciary and employees working in such establishments in as much as exercise of jurisdiction of the Tribunal would interfere with the control absolutely vested in the respective High Courts in regard to the judicial and other subordinate officers under Article 236 of the

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R. N. Misra
Judge
Supreme Court of India

nstitution.

3. After oral arguments were over ned Attorney General, after obta- g instructions from the Central vernment filed a memorandum to the ct that section 2 (q) of the Act ld be suitably amended so as to lude officers and servants in the ployment of the Supreme Court and nbers and staff of the subordinate iciary from the purview of the . In the same memorandum it also been said that Government uld arrange for sittings of the be- es of the Tribunal at the seat or s of each High Court on the basis 'sittings' will include 'circuit sit- gs' and the details thereof would worked out by the Chairman or the e-Chairman concerned.

4. With these concessions made the learned Attorney General, only aspects remain to be dealt with us, namely, those covered by the t and the second contentions.

5. Strong reliance was placed on judgment of Bhagwati, J (one of presently the learned Chief Justice) Minerva Mills Ltd. and others v. ion of Iadia and others 1 (1981) SCR 206, 287, where it was said :

The power of judicial review is an egral part of our constitutional sy- em and without it, there will be no overnment of laws and the rule of w would become a teasing illusion d a promise of unreality. I am of e view that if there is one feature our Constitution which, more than any other, in basic and fundamental to the mintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that, however effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken and away it is provided that the validity of any law made by the Legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the Legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and tender the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review..............."

6. Article 32 was described by Dr. Ambedkar in course of the debate in the Constituent Assembly as the 'soul' and 'heart' of the Constitution and it is in recognition of this position that though Article 323A (2)

(b) authorised exclusion of jurisdiction under Article 32 and the original Act had in Sec. 28 provided for it, by amendment jurisdiction uuder Article 32 has been left untouched. The Act thus saves jurisdiction of this Court both under Article 32 in respect of original proceedings as also under Article 136 for entertaining appeals against decisions of the Tribunal on grant of Special Leave. Judicial review by the apex court has thus been left in tact.

7. The question that arises however, for consideration is whether bar of jurisdiction under Articles 226 and 227 affects the provision for judicial review. The right to move the High Court in its writ jurisdiction-unlike the one under Article 32, is not a fundamental right. Yet, the High Courts, as the working experience of three and a half decades shows have in exercise of the power of judicial review played a definite and positive role in the matter of preservation of fundamental and other rights and in keeping administrative action under reasonable control. In thess thirty-six years following the enforcement of the Constitution, not only has India's population been more than doubled but also the number of litigations before the courts including the High Court has greatly increased. As the pendency in the High Courts increased and soon became the pressing problem of backlog, the nation's attention came to be bestowed on this aspect. Ways and means to relieve the High Courts of
the load began to engage the atte
tion of the Government at the Cent
as also in the various States. As ear
as 1969, a Committee was set up
the Central Government under t
chairmanship of Mr. Justice Shah
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of matters relating to service disput
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fore this Court and the High Court
While this report was still engagin
the attention of Government, the A
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mended the setting up of Civil Servic
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In May 1976, a Conference of Chie
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R. N. Misra
Judge
Supreme Court of India

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on owned or controlled by the
ernment." As already stated this
cle envisaged exclusion of the juris-
on of all courts, except the jurisdic-
of the Supreme Court under Arti-
136, with respect to the disputes
omplaints referred to in clause (1).
gh the Constitution now contained
enabling power, no immediate steps
taken to set up any Tribunal as
emplated by Article 323A. A Con-
tion Bench of this Court in K. K.
a v. Union of India, 1980 3 SCR
observed :

"There are few other litigative
s than disputes between members
arious services inter se, where the
ciple that public requires that all
ation must have an end can apply
greater force. Public servants
t not to be driven or required to
pate their time and energy in court-
n battles. Thereby their attention
iverted from public to private affairs
their inter se disputes affect their
e of oneness without which no ins-
ion can function effectively The
stitution of Service Tribunals by
e Governments with an apex Tribu-
at the Centre which in the genera-
of the cases, should be the final
ter of controversies relating to con-
ons of service, including the vexed question of seniority, may save the courts from the avalanche of writ petitions and appeals in service matters. The proceedings of such Tribunals can have the merit of informality and if they will not be tied down to strict rules of evidence, they might be able to produce solutions which will satisfy many......".

In the meantime the problem of the backlog of case in the High Courts becomes more acute and pressing and came to be further dicussed in Parliament and in conferences and seminars.

Ultimately in January 1985, both Houses of Parliament passed the Bill and with the Presidential assent on 27th February, 1985, the law enabling the long awaited Tribunal to be constituted came into existence. As already noticed, the Central Government notified the Act to come into force with effect from 1.11.1985.

8. Exclusion of the jurisdiction of the High Courts in service matters and its propriety as also validity have thus to be examined in the background indicated above. We have already seen that judicial review by this Court is left wholly unaffected and thus there is a forum where matters of importance and grave injustice can be brought for determination or rectification. Thus exclusion of the jurisdiction of the High Court does not totally bar judicial review. The Court in Minerva Mills case 1980 3 SCR 811 (supra) did point out that "effective alternative institutional mechanisms or arrangements for judicial review" can be made by Parlia-

ment. Thus it is possible to set up an alternative institution in place of the High Court for providing judicial review. The debates and deliberations spread over almost two decades for exploring was and means for relieving the High Courts of the load of backlog of cases and for assuring quick settlement of service disputes in the interest of the public servants as also the country cannot be lost sight of while consideing this aspect. It has not been disputed before us-and perhaps could not have been-that the Tribunal under the scheme of the Act would take over a part of the existing backlog and a share of the normal load of the High Courts. The Tribunal has been contemplated as a substitute and not as supplemental to the High Court in the scheme of administration of Justice. To provide the Tribunal as an additional forum where parties could go to the High Court would certainly have been a retrogade step considering the situation and circumstances to meet which the innovation has been brought about. Thus barring of the jurisdiction of the High Court can indeed not be a valid ground of attack.

9. What, however, has to be kapt in view is that the Tribunal should be a real substitute of the High Court-not only in form and de jure but in content & de facto. As pointed out in Minerva's Mills, case (supra) the alternative arrangement has to be effective and efficient as also capable of upholding the constitutional limitations. Art. 16 of the Constitution guarantees equality of opportunity in matters of public employment. Art. 15 bars discrimination o grounds of religion, race, caste, sex o place of birth. The touchstone of equality enshrined in Article 14 is the grea test of guarantees for the citizen. Centring around these articles in the Constitution a service jurisprudence ha already grown in this country. Unde Sections 14 and 15 of the Act all th powers of the Courts except those o this Court in regard to matters specifie therein vest in the Tribunal-either Central or State. Thus the Tribunal is th substitute of the High Court and i entitled to exercise the powers thereof.

10. The High Courts have bee functioning over a century and a quarter and until the Federal Court wa established under the Government o India Act, 1935, used to be the highes courts within their respective jurisdiction subject to an appeal to the Priv Council in a limited category of cases. In this long period of about six score of years, the High Courts have playe their role effectively, efficiently as als satisfactorily. The litigant in this country has seasoned himself to look upt the High Court as the unfailing protector of his person, property and honour. The institution has served its purpose very well and the common ma has thus come to repose great confidence therein. Disciplined, independen and trained Judges well-versed in la and working with all openness in a unattached and objective manner hav

ensured dispensation of justice over the years. Aggrived people approach the Court the social mechanism to act as the arbiter-not under legal obligation but under the belief and faith that justice shall be done to them and the State's authorities would implement the decision of the Court. It is, therefore, of paramount importance that the substitute institution-the Tribunal-must be a worthy successor of the High Court in all respects. That is exactly what this Court intended to convey when it spoke of an alternative mechanism in Minerva Mills' case (supra).

11. Chapter II of the Act deals with establishment of Tribunals and Benches thereof. Section 4 provides for establishment while Section 5 deals with composition of the Tribunal and Benches thereof Section 6 lays down the qualifications of Chairman, Vice-Chairman and members. So far as the Chairman is concerned, sub-section (1) requiries thht he should be or have been—

(a) a Judge of a High Court ; or

(b) has for at least two years, held office as Vice-Chairman or

(c) has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India.

Sub-section (2) prescribing the qualification for Vice-Chairman provides that he should be or have been—

(a) a Judge of a High Court ; or

(b) for at least two years' held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India ; or

(bb) for at least five years, held the post of an Additional Secretary to Government of India or any other post carrying equivalent pay ;

(c) for a period of not less than three years hears office as a judicial member of an Administrative Tribunal.

12. Sub-section 3 prescribes the qualification of a judicial member and requires that (a) he should be or should have been or qualified to be a Judge of a High Court or (b) has been a member of the Indian Legal Service and has held a post in Grade I of that service for at least three years.

13. Sub-section (3A) provides the qualification for appointment as Administrative Member and lays down that such person should have, for at least two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay not less than that of an Additional Secretary to Govt, of India; or (b) has, for at least three years, held the post of Joint Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Joint

Secretary to Government of India. So far as the chairman is concerned, we are of the view that ordinarily a retiring Chief Justice of a High Court or when such a person is not available, a Senior Judge of proved ability either in office or retired should be appointed. That office should for all practical purposes be equated with office of a High Court. We must immediately point out that we have no bias, in any manner, against, Members of the Service. Some of them do exhibit great candour, wisdom, capacity to deal with intricate problems with understandig, detachment and objectiveness but judicial discipline generated by experience and training in an adequate does is, in our opinion, a necessary qualification for the post of Chairman. We agree that a Vice-Chairman with these qualifications and experience of two years may be considered for appointment as Chairman but in order the Tribunal may be acceptable to the litigants who are themselves members of the various services, S. 6 (1) (c) should be omitted. We do not want to say anything about Vice-Chairman and members deal with in Sub-sec. (2) (3), or (3A) because so far as their selection is concerned, we are of the view that such selection when it is not of a sitting Judge or vehicle Judge of a High Court should be done by a high-powered committee with a sitting Judge of the Supreme Court to be nominated by the Chief Justice of India as its Chairman. This will ensure selection of proper and competent people to man these high offices of trust and help to build up reputation and acceptability. Once the qualifications indicated for appointment of chairman are adopted and the manner of selection of Vice-Chairman and Members is followed, we are inclined to think that the manning of the Tribunal would be proper and conducive to appropriate functioning. We do not propose to strike down the prescriptions containing different requirements but would commend to the Central Government to take prompt steps to bring the provisions in accord with what we have indicated. We must state that unless the same be done, the Constitution of the Tribunal as a substitute of the High Court would be open to challenge We hasten to add that our judgment shall operate prospectively and would not affect appointments already made to the offices of Vice-Chairman and Member both administrative and judicial.

14. Section 8 of the Act drescribes the term of office and provides that the term for Chairman Vice-Chairman or members shall be of five years from the date on which he enters upon his office or until he attains the age of 65 in the case of Chairman or Vice-Chairman and 62 in the case of member, whichever is earlier. The retiring age of 62 or 63 the digerent categories is in accord with the pattern and fits into the scheme in comparable situations. We would, however, like to indicate that appointment for a term of five years any occasionally operate as a dis-incentive for well qualified people to accept the offer to join the

Tribunal. There may be competent people belonging to younger age groups who would have more than five years to reach the prevailing age of etirement. The fact that such people would be required to go out on completing the five years person out long before the superannuation age is reached is bound to operate as a deterrent. Those who come to be Chairman Vice Chairman or members esign appointments, if any, held by hem before joining the Tribunals and, as uch there would be no scope for their eturn to the place or places from where they come. A five year period s not a long one. Ordinarily some ime would be taken for most of the members to get used to the service urisprudence and when the period is nly five years, many would have to o out by the time they are fully cquainted with the law and have good grip over the job. To require etirement at the end of five years s thus neither convenient to the erson selected for the job nor expe-ient to the scheme. At the hearing, earned Attorney-General referred to he case of a member of the Public ervice Commission who is appoined for a term and even suffers the isqualification in the matter of furher employment. We do not think hat is a comparable situation. On he other hand, membership in other igh powered Tribunals like the Income-ax Appellate Tribunal or the Tribual under the Customs Act can be eferred to. When amendments to the Act are undertaken, this aspect of the matter deserves to be considered, particularly because the choice in that event would be wide leaving scope for proper selection to be made.

15. We hope and trust that within a reasonable period not beyond 31st March, 1987, the amendments indicated shall be brought about so as to remove the defects found in the Act.

16. Bhagwati, C. J.—I am in entire agreement with the judgment prepared by my learned brother Ranganath Misra, but since the questions involved in these writ petitioners are of seminal importance effecting as they do, the structure of the judicial system and the principle of independence of the judiciary, I think I would be failing in may duty if I did not add a few words of my own.

17. There are two questions which arise for consideration in these writ petitions and they have been succintly set out in the judgment of Ranganath Misra, J. The first question in whether the exclusion of the jurisdiction of the High Court under Articles 226 and 227 of the Constitution in service matters specified in section 28 of the Administrative Tribunals Act, 1985 (hereinafter referred to as the impugned Act) and the vesting of exclusive jurisdiction in such service matters in the Administrative Tribunal to be constituted under the impugned Act, subject to an exception in favour of the jurisdiction of this Court under Article 32 and 136, is unconstitutional and void and in any event, even if

the first question be answered against the petitioners and in favour of the Government, the second question required to be considered is, whether the composition of the Administrative Tribunal and the mode of appointment of Chairman, Vice-Chairman and members have the effect of introducing a Constitutional infirmity invalidating the provisions of the impugned Act. I agree with the answers given to these questions in the judgment of Ranganath Misra J. I would articulate my reasons as follows :

18. It is now well-settled as a result of the decision of this Court in Minerva Mills Ltd. & Ors. v. Union of India & Ors. that judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is. It is a fundamental principle our Constitutional scheme that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. It is a limited Government which we have under the Constitution and both the executive and the legislature have to act within the limits of the power conferred upon them under the Constitution. Now a question my arise as to what are the powers of the Executive and whether the Executive has acted within the scope of its power, such a question obviously cannot be left to the Executive to decide and for two very good reasons. First the decision of the question would depend upon the interpretation of the Constitution and the laws and this would pre-eminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this filed and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law, the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. The judiciary is constituted the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of Government, what are the limits on the exercise of such power under the Constitution and whether ony action of any branch transgresses such limits. It is also

pasic principle of the Rule of Law nich permeates every provision of the onstitution and which from its very re and essence that the exercise of ower by the executive or any other thority must not only be conditioned the Constitution but also be in accdance with law and it is the judiciary nich has to ensure that the law is obsved and there is compliance with the quirements of law on the part of the ecutive and other authorities. This nction is discharged by the judiciary exercise of the power of judicial rev- v which is a most potent weapon in e hands of the judiciary for maintenae of the Rule of law. The power of dicial review is an integral part of our nstitutional system and without it, ere will be no Government of laws id the Rule of Law would become a asing illusion and a promise of unreay. That is why I observed in my judgent in Minerva Mills Ltd. case (supra) pages 287 and 288 :

"I am of the view that if there is ie feature of our Constitution which, ore than any other, is basic and found nental to the maintenace of democrary id the rule of law, it is the powers of dicial review and it is unquestionably my mind part of the basic structure the Constitution. Of course, when I y this I should not be taken to sugge- that however effective alternative in- itutional mechanisms or arrangements r judicial review cannot be made by arliament. But what I wish to emphase is that judicial review is a vital rinciple of our Constitution and it can not be abrogated without affecting the basic structure of the Constitution If by a Constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the Legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or violative of any fundamental rights, it would be nothing short of subversion of the Constitution for it would make mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basis structure and, therefore, outside the mandatory power of Parliament; it would be making Parliament sole judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and effect the basic structure of the Constitution. The conclusion must therefore inevitably follow that clause (4) of the Article 368 in unconstitutional and void as damaging the basic structure of the Constitution."

It is undoubtedly true that my judgment in Minerva Mills Ltd. case (supra) was a minority judgment but so far as this aspect is concerned, the majority

Judges also took the same view and hold that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision that though judicial review cannot be altogather abrogated by Parliament by amending the Constitution in exercise of its constituent power, Parliament can certainly, without in any way violating the basic structure doctrine, set up effective alternative institutional mechanisms or arrangements for judicial review. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, anothere alternative institutional mechanism or arrangement for judicial review provided it is not less efficacious than the High Court. Then, instead of the High Court, it would be another institutional mechanism or authority which should be exercising the power judicial review with a view to enforcing the constitutional limitations and maintaining the Rule of Law. Therefore, if any constitutional amendment made by Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, namely, that the alternative institutional mechanism or authority set up by the parliamentary amendments is no less effective than the High Court.

19. Here, in the present case, the impugned. Act has been enacted by Parliament in exercise of the power Conferred by clause (1) of Article 323-A which was introduced in the Constitution by Constitution (42nd Amendment) Act, 1976 Clause (9) (d) of this Article provides that a law made by Parliament under clause (1) may exclude the jurisdiction of courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1). The exclusion of the jurisdiction of the High Court under Articles 226 and 227 by any law made by Parliament under clause (1) of Article 323A is, therefore, specifically authorised by the constitutional amendment enacted in clause (2) (d) of that Article. It is clear from the discussion in the preceding paragraph that this constitutional amendment authorising exclusion of the jurisdiction of the High Court under Articles 226 and 227 must provide for an effective alternative institutional mechanism or authority for judicial review. If this constitutional amendment were to permit a law made under clause (1) of Article 323A to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure doctrine and hence outside the constituent power of Parliament. It must, therefore, be read as

nplicit in this constitutional amend-
ent that the law excluding the juris-
ction of the High Court under Arti-
es 226 and 227 permissible under it
ust not leave a void but it must set
another effective institutional mecha-
sm or authority and vest the power
judicial review in it. Consequently,
e impugned Act excluding the juris-
ction of the High Court under Arti-
es 226 and 227 in respect of service
atters and vesting such jurisdiction
the Administrative Tribunal can pass
test of constitutionality as being
thin the ambit and coverage of clause
(b) of Article 323A, only if it can
shown that the Administrative Tribu-
l set up under the impugned Act is
ually efficacious as the High Court,
far as the power of judicial review
er service matter is concerned. We
ust, therefore, address ourselves to
e question whether the Administrative
ibunal established under the impug-
d Act can be regarded as equally
ective and efficacious in exercising
e power of judicial review as the high
ourt acting under Article 226 and 227
the Constitution.

20. It is necessary to bear in mind
at service matters which are removed
om the jurisdiction of the High Court
der Articles 226 and 227 of the Cons-
ution and entrusted to the Adminis-
ative Tribunal set up under the impug-
d Act for adjudication involve ques-
ons of interpretation and applicability
, 15, 16 and 311 in quite a large
mber of cases. These questions require for their determination not only judicial approach but also knowledge and expertise in this particular branch of constitutional law. It is necessary that those who adjudicate upon these questions should have same modicum of legal training and judicial experience because we find that some of these questions are so difficult and complex that they baffle the minds of even trained Judges in the High Courts and the Supreme Court. That is the reason why at the time of the preliminary hearing of these writ petitions we insisted that every bench of the Administrative Tribunal should consist of the judicial member and one administrative member and there should be no preponderance of administrative members on any bench. Of course, the presence of the administrative member would provide input of practical experience in the functioning of the services and add to the efficiency of the Administrative Tribunal but the legal input would undeniably be more important and sacrificing the legal input or not giving it sufficient weightage would definitely impair the efficacy and effectiveness of the Administrative Tribunal as compared to the High Court. Now section 6 provides that the Chairman of the Administrative Tribunal should be or should have been a Judge of the High Court or he should have for at least two years held office of Vice-Chariman or he should have for at least two years held the post of Secretary to the Government of India

or any other post under the Central or State Government carryng a scale of any which is not less than that of a Secretary to the Government of India. I entirely agree with Ranganath Misra, J. that the Chairman of the Administrative Tribunal should be or should have been a Judge of a High Court or he should have for at least two years held office as Vice-Chairman. If he has held office as Vice-Chairman for a period of at least two years he would have gathered sufficient experience and also within such period of two years, acquired reasonable familiarity with the constitutional and legal questions involved in service matters But substituting the Chief Justice of a High Court by a Chairman of the Administrative Tribunal who has merely held the post of a Secretary to the Government and who has no legal or judicial experience would not only fair to inspire confidence in the public mind but would also render the Administrative Tribunal a much less effective and efficacious machanism than the High Court. We cannot afford to forget that it is the High Court which is being supplemented by the Administrative Tribunal and it must be so manned as to inspire confidence in the public mind that it is a highly competent and expert mechanism with judicial approach and objectivity. Of course, I must make it clear that when I say this, I do not wish to cast any reflection on the members of the Civil Services because fortunately we have, in out country, brilliant civil servants who possess tremendous sincerity, drive and initiativ
and who have remarkable capacity t
resolve and overcome administrativ
problems of great complexity. Bu
what is needed in a judicial tribuna
which is intended to supplement th
High Court is legal training and experience. I am, therefore, of the vie
in agreement with Ranganath Misra
J that clause (c) of section 6 (1) mus
be struck down as invalid.

21. I also fail to see why a District Judge or an advocate who is qualified to be a Judge of a High Cour
should not be eligible considere
for appointment as Vice-Chairman o
the Administrative Tribunal. It ma
be noted that since the Administrativ
Tribunal has been created in substitution of the High Court, the Vice-Chairman of the Administrative Tribuna
would be in the position of a Hig
Court Judge and if a District Judge o
an advocate qualified to be a Judge o
the High Court, is eligible to be
High Court Judge, there is no reaso
why he should not equally be eligibl
to be a Vice-Chairman of the Administrative Tribunal. Can the position o
a Vice-Chairman of the Administrativ
Tribunal be considered higher tha
that of a High Court Judge so that
person who is eligible to be a Hig
Court Judge may yet be regarded a
ineligible for becoming a Vice-Chairman of the Administrative Tribunal
It does appear that the provisions o
the impugned Act in regard to the composition of the Administrative Tribunal are a little weighted in favour o

embers of the Services. This weigh- ge in favour of the members of the ervices and value discounting of judi- al members does have the effect of aking the Administrative Tribunal ss effective and officacious than e High Court. I would therefore ggest that a District Judge or an ad- ocate who is qualified to be a Judge f the High Court should be regarded eligible for being Vice-Chairman of e Administrative Tribunal and un- ss an amendment to that effect is car- ed out on or before 31st March, 987, the impugned Act would have to declared to be invalid, because the ovision in regard to composition of e Administrative Tribunal cannot be vered from the other provisions con- ined in the impugned Act.

22. That takes me to another rious infirmity in the provisions of e impugned Act in regard to the ode of appointment of the Chairman, ice-Chairman and members of the dministrative Tribunal So for as the pointment of judicial member of the dministrative Tribunal is concerned, ere is provision introduced in the npugned Act by why of amendment at the judicial members shall be ap- inted by the Government concerned consultation with the Chief Justice India. Obviously no exception can taken to this provision, because even far as Judges of the High Court are ncerned, their appointment is re- uired to be made by the President in- r alia in consultation with the Chief stice of India. But so far as the appointment of Chairman, Vice-Chairman and administrative members is concerned, the sole and exclusive power make such appointment is conferred on the Government under the impugned Act. There is no obligation cast on the Government to consult the Chief Justice of India or to follow any particular selection procedure in this behalf The result is that it is left to the absolute unfettered discretion of the Government to appoint such person or persons as it likes as Chairman, Vice-Chairman and administrative members of the Administrative Tribunal. Now it may be noted that almost all cases in regard to service matters which came before the Administrative Tribunal would be against the Government or any of its officers and it would not at all be conducive to judicial independence to leave unfettered and unrestricted discretion in the executive to appoint the Chairman, Vice-Chairman and administrative members if a judicial member or an Administrative member is looking forward to promotion as Vice-Chairman or Chairman he would have to depend on the goodwill and favourable stance of the executive and that would be likely to affect the independence and impartiality of the members of the Tribunal. The same would be the position vis-a-vis promotion to the office of Chairman of the Administrative Tribunal. The administrative members would also be likely to carry a sense of obligation to the executive for having been appointed members of the Administrative Tribunal and that

would have a tendency to impair the independence and objectivity of the Tribunal. There can be no doubt that the power of appointment and promotion vested in the executive can have prejudicial effect on the independence of the Chairman, Vice-Chairman and members of the Administrative Tribunal, if such power is absolute and unfettered. If the members have to look to the executive for advancement, it may tend, directly or indirectly, to influence their decision making process particularly since the Government would be a litigant in most of the cases coming before the Administrative Tribunal and it is the action of the Government which would be challenged in such cases. That is the reason why in case of appointment of High Court Judges the power of appointment vested in the executive is not an absolute unfettered power but it is hedged in by a wholesome check and safeguard and the President cannot make an appointment of a High Court Judge without consultation with the Chief Justice of India and a healthy convention has grown up that no appointment would be made by the Government which is not approved by the Chief Justice of India This check or safeguard is totally absent in the case of appointment of the Chairman, Vice-Chairman and administrative members of the Administrative Tribunal and the possibility cannot be ruled out indeed the litigating public would certainly carry a feeling that the decision making process of the Chairman, Vice-Chairman and members of the Administrative Tribunal might be likly to be affected by reason of dependence on the executive for appointment and promotion It can no longer be disputed that total insulation of the judiciary from all forms of interference from the coordinate branches of Government is a basic essential feature of the Constitution. The Constituion makers have made anxious provision to secure independence of the judiciary from executive pressure or influence Obviously, therefore if the Administrative Tribunal reiseated in substitution of the High Court and the jurisdiction of the High Court under Articles 226 and 227 is taken away and vested in the Administrative Tribunal, the same independence from possibility of executive pressure or influence must also be ensured to the Chairman, Vice-Chairman and members of the Administrative Tribunal. Or else the Administrative Tribunal would cease to be an equally effective and efficacious substitue for the High Court and the provisions of the impugned Act would be rendered invalid. I am therefore, of the view that the appointment of Chairman, Vice-Chairman and administrative members should be made by the concerned Governments only after consultation with the Chief Justice of India and such consultation must be meaningful and effective and ordinarily the recommendation of the Chief Justice of India must be accepted unless there are cogent reasons, in which event the reasons must be disclosed to the Chief Justice of India and his response must be invited to such reasons. There is also another ternative which may be adopted by e Government for making appoint- ents of Chairman Vice-Chairman and embers and that may be by setting ɔ a High Powered Selection Commi- ee headed by the Chief Justice of India a sitting Judge of the Supreme Court concerned High Court nominated the Chief Justice of India. Both ese modes of appointment will ensure lention of proper and competent ersons to man the Administrative ribunal and give it prestige and reput- ion which would inspire confidence the public mind in regard to the mpetence, objectivity and impartiality those manning the Administrative ribunal. If either or these two modes appointment is adopted it would ve the impugned Act from invalidation. therwise, it will be outside the scope the power conferred on Parliament nder Article 323A I would however asten to add that this judgment will perate only prospectively and will not validate appointments already made the Administrative Tribunal. But if y appointment of Vice-Chairman or dministrative members are to be made ereafter, the same shall be made by e Government in accordance with either of the aforesaid two modes of appointment.

23. I may also add that if the Administrative Tribunal is to be an equally effective and effcacious substitution for the High Court on the basis of which alone the impugned Act can be sustained, there must be a permanent or if there is not sufficient work then a circuit Bench of the Administrative Tribunal at every place where there is a seat of the High Court. I would, therefore, direct the Government to set up a permanent bench and if that is not feasible having regard to the volume of work, then atleast a circuit bench of the Administrative Tribunal wherever there is a seat of the High Court, on or before 31st March, 1987. That would be necessary if the provisions of the impugned Act are to be sustained. So for as rest of the points dealt with in the judgment of Ranganath Misra, J, are concerned, I express my entire agreement with the view taken by hin.

V. Khalid G. L. Oza and M. M. Dutt, J. We have read both the Judgments just delivered the main judgment of learned Brother Ranganath Misra and the other of Hon'ble the Chief Justice. We agree with both.

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Report No. 72, P. 18

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

Report No. 73, p. 01

D. A. Desai
Judge
Supreme Court of India

OBSERVATION

Punjab Civil Services (Premature Retirement) Rules (1975). Rr.2 (3) and 3 (1)(a)—Premature retirement of Government servant on ground of completion of 25 years of qualifying service—Expression 'qualifying service".

OBSERVED BY

D. A. Desai and
D. P. Madon,

Hon'ble Judges, Supreme Court of India

IN

Civil Appeal No. 1251 of 1978 decided on 26-10-1984, between Hans Raj, Appellant v. State of Punjab and others, Respondents.

TEXT

Desai, J. :- Appellant joined service as a Clerk in the Civil Supplies Department of the erstwhile Patiala and East Punjab States Union ("PEPSU' for short) on September 2, 1949. He was a temporary employee and he was discharged from service on September 30, 1953. On February 22, 1954, he was again recruited as a clerk in the consolidation department of PEPSU. In course of time, he was promoted as senior clerk and came to be allocated to Punjab State on the merger of PEPSU with erstwhile Punjab State. The Deputy Commissioner of Bhatinda transferred the appellant and posted him as Assistant in his office after obtaining concurrence of the Subordinate Service Selection Board, Punjab with effect from January 1, 1962. On the reorganisation of Punjab State in 1966, the appellant came to be allocated to Punjab State. After declaration of national emergency, the Governor of Punjab in exercise of the power conferred by the proviso to Art. 309 of the Constitution and all other powers enabling thereto and with the previous approval of the Central Government under sub-sec. (7) of S. 115 of the States Reorganisation Act, 1956 and sub-sec. (6) of the Sec. 82 of the Punjab Reorganization Act, 1966 framed Punjab Civil Service (Premature Retirement) Rules, 1975 ('Premature Retirement Rules') for short Rule 3 conferred power on the appropriate authority to order premature retirement of the Government servant governed by the rules. It reads as under :

"3 (1) (a). The appropriate authority shall, if it is of the opinion that it is in public interest to do so, have the absolute right, by giving any employee prior notice in writing to retire that employee on the date on which he completes twenty five years of qualifying service or attains fifty years of age or on any date thereafter to be specified in notice

(b) The period of such notice shall not be lees than three months :

Provided that where at least three months' notice is not given or notice for a period less than three months is given, the employee shall be entitled to claim such equivalent to the amount of his pay and allowances at the same rates at which he was drawing them immediately before the date of retirement for a period of three months or, as the case may be for the period by which such notice falls short of three months.

(2) Any Government employee may, after giving at least three months' previous notice in writing to the appropriate authority retire from service on the date on which he completes twenty five years of qualifying service or attains fifty years of age or on any date thereafter to be specified in the notice;

Provided that no employee under suspension shall retire from service except with the specific approval of the appropriate authority,"

In exercise of the power conferred by rule 3(1)(a), Deputy Commissioner, Bhatinda passed an order of the premature retirement of the appellant dated August 20, 1975. It reads as under :

"No. 173 Dated 28-8-1975

Under Rule 3 (1) (a) of the Punjab Civil Service (Premature Retirement) Rules, 1957, Shri Hans Raj, Sub-Divisisonal, Assistant, S D.O. (Civil Office, Bhatinda who has completed more than 25 years service is hereby retired from service from the date of order.

2. He shall be entitled to three months pay in lieu of notice as is admissible under proviso below rule 3 (1) (b) of the Rules ibid.

3. He shall further be entitled to the benefits of retiring pension and death cum retirement gratuity, admissible under the rules.

Sd/-
Deputy Commissioner.
Bhatinda."

The appellant was accordingly prematurely retired by the appropriate authority on ground that he has completed more than 25 years of service and that even though he was prematurely retired, he was entitled to the benefits of retiring pension and death cum retirement gratuity, admissible under the rules. The appellant questioned the validity, legality and correctness of the order of premature retirement in C.W.P. No. 6461 of 1976 in the High Court of Punjab and Haryana at Chandigarh. It was inter alia contended before a Division Bench of the High Court that on the relevant date, the appellant had not completed 25 years of qualifying service and therefore, he could not have been retired under Rule 3 (1). It was also contended that the impugned order of remature retirement suffered from the ice of non-application of mind in as uch as it does not state that the ower of prematurely retiring the appeant was exercised in public interst. It was urged that the power to rematurely retire a Government serant conferred by Rule 3 postulates wo pre-requisites (i) that it is in pubc interest to prematurely retire the overnment servant and (ii) that eith r he has completed 25 years of qualiying service or he has attained 50 ears of age. It was accordingly conended that if the pre-requisites for xercise of power, are not satisfied, e order would be ab initio void nd would not have the effect of brining about the termination of service. here were other contentions raised on ehalf of the appellant before the High ourt with which we are not concerned this appeal.

2. A return was filed on behalf f the respondents by the third resporent-Deputy Commissioner, Bhatinda, ho has passed the impugned order. t was stated that the conduct of the pplicant in the year 1971-72 was ound unsatisfactory. His integrity as found doubtful. It was specificlly contended that the appellant was rematurely retired from service on is completion of more than 25 years f service and the computation that e had completed 25 years of service as correct because the break in serice from October 1, 1953 to February 1, 1954 was condoned by the PEPSU Government vide Revenue Department Letter No. RD-13 (25) SS-/56-7101 dated June 28, 1956 and that once the break in service was condoned, the appellant on the date of premature retirement had completed 25 years of qualifying service. A bold statement was made that the power was exercised in public interest but the impugned order is wholly silent on this material point.

3. A Division Bench of the High Court rejected the writ petition observing that once the break in service from September, 1953 to February 21, 1954 was condoned, the appellant had completed 25 years of service and after recording the statement of the learned counsel appearing on behalf of the respondents that the Memo No. XI IN XI/Misc. file/75-76/1618-19 dated January 1, 1976 issued by the Accounts Officer attached to the Office of the Accountant General, Punjab and addressed to the Sub-Divisional Officer (c), Bhatinda stating therein that the service of the appellant for the period from October 1, 1953 to February 21, 1954 do not qualify for pension as service prior to the break was for a period less than five years which would not be given effect to and thereupon concluded that the prerequisite for exercise of power under Rule 3 (1) (a) was satisfied. Hence this appeal by special leave.

4. Mr. N.D. Garg, learned counsel for the appellant canvassed two contentions before us; (1) that the order dated August 28, 1956 issued in the

name of the Raj Pramukh of PEPSU sanctioning the condonation of break in service of the appellant for the period October 1, 1953 to February 21, 1954, was for the limited purpose of granting quasi-permanent status and issuing quasi-permanent certificate only and for no other purpose and therefore the Accountant General rightly held that the condonation in break of service did not qualify for pension and therefore the High Court was in error in holding that the appellant had put in 28 years of qualifying service on the date of the impugned order; and (2) the order suffers form the vice of complete non-application of mind inasmuch as in the impugned order there is not the slightest whisper that the power was exercised in public interest.

5. Rule 3 (1) (a) of the Premature Retirement Rules confere power on the appropriate authority to retire any employee, if it is of the opinion that it is in the public interest to do so, on the date on which he completes 25 years of qualifying service or attained 50 years of age. This power of premature retirement can be exercised firstly in public interest and secondly if one of the two conditions is satisfied namely that either the employee who is to be retired has completed 25 years of qualifying service on the date on which he is to be retire or he has attained the age of 50 on that date. The power can be exercised on the date on which one of the two alternative fact situations becomes available or on any date thereafter. Therefore, the appropriate authority must first make up it is in public interest to retire the employee. Once having reached that satisfaction, it must further find out whether the concerned employee has on the relevant date completed 25 years of qualifying service or whether he has attained the age of 50 years The respondents in this case assert that the appropriate authority has retired the appellant as it was of the opinion that it was in public interest to do so and on the relevant date the appellant had completed 25 years of qualifying service

6. Taking the second contention first, it is incumbent upon the respondents to show that on the date of the impugned order, the appellant had completed 25 years of qualifying service Let there be no confusion that it is not 25 years of service but it is 25 years of qualifying service witich must have been completed before the power can be exercised. The expression 'qualifying service' has been defined in R. 2 (3) of the premature Retirement Rules to mean 'service qualifying for pension'. The expression 'service qualifying for pension' as understood in the rules governing pension in the Punjab Civil Services has been given various shades of meaning. Punjab Civil Services Rules Vol. II, Chapter III para 3.12 provides that 'the service of a Government employee does not qualify for pension unless it conforms to the three conditions therein mentioned:

First— The service must be under Government.

Second— The employment must be substantive and permanent.

Third—The service must be paid by
Government.'

The rules permit condonation of
terruption or break in service. If there
a break, how the service prior to the
reak has to be dealt with for the pur-
ose of computing qualifying service has
een dealt with in Chapter IV para 4.23
nder the heading De Condonation of
terruptions and Deficiencies. It provi-
es that interruption in service (either
etween two spells of permanent or tem-
orary service or between a spell of tem-
orary service and permanent service or
ice versa), in the case on an officer ret-
ing on or after the 5th January, 1961,
ay be condoned, subject to the condi-
ons, therein mentioned. The relevant
ondition reads as under :

"(2) Service preceding the interru-
tion should not be less than five years'
uration. In cases where there are two
r more interruptions, the total service,
ensionary benefits in respect of which
hall be lost if the interruptions are not
ondoned should not be less than five
ears.'

7. The question is whether the ser-
ice rendered by the appellant despite
he fact that it was temporary for the
eriod September 30, 1953 to February 22,
954 when he was re-inducted in service
an be included in reckoning qualifying
ervice on the date of the impugned or-
ler because it is conceded that if the
ervice prior to the break is ignored,the
ppellant had not completed 25 years of
ualifying service on the date of the
mpugned order. To recall a few facts
the appellant joined service on September, 1949. He was discharged on September 30, 1953. Therefore, the service prior to the break was, of roughly four years and 28 days duration. At any rate it was less than five years in duration. Therefore, Condition No. 2 in para 4.23 of the Premature Retirement Rules would be attracted because it provides that interruption in service map be condoned if amongst others, service preceding the interruption is not less than five years. As the service prior to the break was less than five years even if the interruption or break in service is condoned unconditionally, the earlier service would not qualify for being reckoned as qualifying service for the purpose of pension. This is exactly what the Accountant General in his order dated January 1, 1976 has opined when he said that in the case of the appellant service prior to the break being less than five years' duration, such service does not qualify for pension. He accordingly computed qualifying service from Feb. 22, 1954 till August 20, 1975 when the impugned order was passed An arithmetical computation would show that the appellant had not completed 25 years of qualifying service on August 20, 1975.

8. It was however, contended on behalf of the respondents that as the break in service from Sept. 30, 1953 to February 21, 1954 was condoned, the appellant can be said to be continuously in service from September 2 1949 and therefore on August 20, 1975 he had completed more than 25 years of qualifying ser-

vice. Undoubtedly, the Raj Pramukh of PEPSU had sanctioned condonation of break in service from october 1, 1953 to February 21, 1954 in the service of the appellant. Whether this condonation would make the service continuous for the purpose of treating earlier service as includible in computing qualifying service, it is necessary to examine the purpose, the content and the benefit granted by this order.

The order of the Raj Pramukh reads as under :

"His Highness the Rajpramukh has been pleased to sanction the condonation of break from 1-10-1953 to 21-2-1954 in the service of Shri Hans Raj, under note to sub-para (iii) of of para 3, Annexure 'B' of the PEPSU Civil Services (Temporay Service) Rules, 1955) for the purpose of issuing quasi permanent certificate only, provided that his service was not discontinued as a result of resignation or his employment elsewhere and further provided that the incumbent has not been confirmed already."

This order has been made in exercise of the powers coferred by sub-para (iii) of para 3 Annexure 'B' to the PEPSU Civil Services (Temporay Service) Rules, 1955. Sub Rule 2 (b) of the aforementioned rules defines 'quasi-permanent service' to mean 'temporary service commencing from the date on which a declaration issued under rule 3 takes effect and consisting of periods of duty and leave (other than cxtraordinary leave) after that date. Rule 3 provides that a Government servant shall be deemed to be in quasi-permanent service; (i) if he has been in continuous Government service for more than 3 years, and (ii) if the appointng authority, being satisfied as to his character for employment in a quasi-permanent capacity, has issued a declaration to that effect, in accordamce with such instructions as the Rajpramukh may issue from time to time. Annexure 'B' sets out instructions regulating the issue of declaration of quasi-permanent eligibility to temporary employees under the PEPSU Civil Services (Temporary Service) Rules, 1955. Para (iii) of sub-para (3) provides that before a certificate of quasi-permanent capacity can be issued, the Government servant should have on the crucial date rendered service for more than three years. Note appended to the para provides that broken peirods of temporary service will not count for purposes of this instruction unless the breaks are condoned specifically by the Government in consultation with the Finance Department and the service thus rendered continues'. It further provides that while condoning break in service for the purpose of issuing quasi-permanent capacity certificate, it should be made clear to the persons concerned that 'the condonation will not entitle them to any benefits regarding the fixation of pay, seniority, pension, gratuity etc. and that the periods condoned will be ignored and not counted as service actuayll rendered. It thus becomes crystal clear hat the certificate issued by Rajpramukh under the PEPSU Civil Service (Temporary Service) Rules, 1955 condoning break in service was for the imited purpose of issuing quasi-permanent capacity certificate. Not only hat the condonation was for this limited ourpose but the negative is clearly pelt out when it is specifically provided that the condonation will not nable a person in whose favour the ertificate is issued to claim any pension or gratuity etc. In other words, he condonation will not render the arlier service if it is otherwise not includible in the computation of qualifying service to so claim it. Therefore, there is no substance in the submission made on behalf of the respondents and which unfortunately found avour with the High Court that because the Rajpramukh of PEPSU had ondoned break in service, the appellant was in continuous uninterrupted ervice from September 2, 1949. For he purpose of computing qualifying ervice for pension the period for which there was interruption will remain a break in service and as the arlier service as provided by para 4. 3, condition No. 2, was for a period f less than five years, the same cannot be taken into account for computing qualifying service. Thus the conclusion is inescapable that the qualifying service which the appellant is hown to have rendered commenced rom February 22, 1954. Inevitably, herefore on August 20, 1975 he had not completed 25 years of qualifying service and therefore, the primary prerequisite for exercise of power is not satisfied and the appellant could not have been compulsorily retired from service. The High Court unfortunately overlooked the basic requirement for exercise of the power namely completing 25 years of qualifying service and proceeded on the basis that rendering 25 years of service will permit exercise of power. There is a marked and noteworthy distinction between service and qualifying service.

9. Incidentally, it may be pointed out that the concession made by the respondent before the High Court that the memo issued by the Accountant General shall not be given effect to is hardly of any legal consequence. It is the duty of the Accountant General to compute the qualifying service for pension. He was satisfied that under the relevant rules the appellant had not completed 25 years of qualifying service on the date of the impugned order. He clearly pointed out that condonation in break in service is of no legal consequence as far as computation of qualifying service is concerned. Therefore, that concession has to be ignored as of no consequence.

10. Mr. Garg next urged that the impugned order made by the competent authority suffers from the vice of non-application of mind inasmuch as it has not been stated in the impugned order that the power was exercised in public interest. There is substance in this contention. The impugned order merely recites that as the appellant has com-

pleted more than 25 years of service, he is retired from the service from the date of the order. Silence about recital of public interest is both conspicuous and glaring probably as the power was exercised by an officer of the rank of Deputy Commissioner who was blissfully unaware of it. The return is also filed by the same officer. In the return filed in this Court, the only contention worth nothing is that as the High Court judgment is clear, convincing and unassailable, this Court should not interfere in exercise of its extraordinary jurisdiction because no case of injustice is made out. In para 5(c) of the return filed in the High Court, it has been stated that the impugned order is legal and the appellant was retired on completion of his 25 years of service. In para (d) it is stated that the order retiring the petitioner prematurely was passed in public interest. The attempt seems to be to merely reproduce the language of the rule without any attempt at bringing the case within the parameters of the relevant rule. If the power was exercised in public interest, one would have expected some whisper about it in the impugned order. However when a specific contention was taken that the power was not exercised in public interest, a routine averment was made that it was exercised in public interest. When this contention was canvassed before this Court, the respondents tried to repel it by saying that in the annual confidential report for the year 1971-72, an entry has been made that the conduct of the appellant was unsatisfactory and his integrity was found doubtful. This is the only entry relied upon to substantitate the charge that the appellant had rendered himself undesirable for further continuance in service and therefore power to compulsory retire him was exercised in public interest. We remain unconvinced for two reasons; (1) that no record was placed before us to show as to whether the adverse entry was ever communicated to the appellant and (2) his record previous and subsequent to the year 1971-72 was not placed before us. Thus there remains a stray entry only. The material for making the entry 3 years prior to the date of the impugned order has not been placed before us. And the more disturbing part is that the entries in the subsequent years have not been shown to us. It therefore, appears that reference to public interest in the return was an attempt at paying lip sympathy to the provision of the relevant rule rather than a serious application of mind while dealing with the career and the consequent starvation heaped upon the appellant by the impugned order. We are therefore, satisfied that the order also suffers from the vice of non-application of mind.

11. However, we propose to rest this judgment on the finding that the pre-requisite for the exercise of power was not satisfied inasmuch as the appellant was not shown to have completed 25 years of qualifying service on the date of the impugned order. Therefore the impugned order compulsoriy retiring the appellant from service is illegal

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D. A. Desai
Judge
Supreme Court of India

nd invalid and must be quashed and et aside. In this view of the matter, we find it difficult to agree the view taken by the High Court.

12. Accordingly, this appeal succeeds and is allowed and the judgment of the High Court is quashed and set aside and is hereby declared that the impugned order dated August 20, 1975 compulsorily retiring the appellant from service of the Punjab Government is illegal and invalid and is hereby quashed. A necessary declaration must follow that the appellant continues in service uninterruptedly and is entitled to all the benefits to which he would have been entitled, had he continued in service. The respondents shall pay the costs of the appellant.

Appeal allowed.

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Report No. 73, P. 10

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

Ranganath Misra
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art 136—Safai Jamadar in High Court dismissed n service denying all retiral benefits–20 years of service rendered by Jama- at time of dismissal—Held, there was scope for taking lenient view—Order ismissal converted into one of compulsory retirement to ensure him retiral efits.

OBSERVED BY

D. A. Desai and
Ranganath Misra,

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 4041 of 1984 (arising out of S.L.P. No. 16990 of 3) decided on 24-9-1984, between Hussaini, Appellant v. The Hon' Chief Justice Iigh Court of Judicature at Allahabad and others, Respondents.

TEXT

Judgment :-Special Leave granted.

2. We heard Mr. J.S. Bali, lea- l counsel for the appellant and s. Shobha Dikshit, learned coun- for the respondents. Appellant ɔ was serving as a safai Jamadar dismissed from service by the istrar of the High Court of Ju- ture at Allahabad. His Writ Peti- having been dismissed, he has, l this appeal by special leave.

3. It appears that appellant joi- service as a sweeper in the High ırt on April 25, 1958. By an order ed April 28, 1978 he was placed er suspension and thereafter was dismissed from service on vember 30, 1978. At the time of nissal he had rendered service for r 20 years. As appellant was dismissed from service, he has been denied retiral benefits such as pension, provident fund and gratuity to which he would be entitled if he is compulsorily retired from service as and by way of punishment. We suggested to Mrs. Shobha Dikshit learned counsel for the respondents to enquire whether any retiral or terminal benefit can be given to the appellant on the basis that he has rendered service for 20 years, the response is positive. However, Mrs. Shobha Dikshit, learned counsel for the respondents pointed out that in law appellant would not be entitled to any retirement benefit in view of the fact that he is dismissed from service by way of punishment.

4. Appellant was a low paid

safai Jamadar. We do not propose to minimise the gravity of his misconduct for which the High Court thought fit to impose maximum punishment of dismissal from service simultaneously denying him all retiral benefits. Without in any manner detracting from the view taken by the High Court we are of the opinion that there is some scope for taking a little lenient view in the matter of punishment awarded to the appellant. The lenience if at all would render the post dismissal life of the low paid employee a little tolerable and keep him away from the penury and destitution.

5. How much is the cushion or the elbow room in the matter of punishment? Appellant cannot be reinstated in service. He must remain out of his last employment. Therefore, the only course open to us is to convert the order of punishment into one of compulsory retirement so while denying service to the ap ant he will be ensured retiral b fits.

We accordingly allow the ap convert the order of dismissal one of compulsory retirem Conseqently the respondent shall Rs. 153/-p. m. twsoards pension to appellant from November 30, 1 The amount of pension is worked ou the respondents on a suggestion mad the Court. The arrears of pension s be paid within two months from to and the pension payment order shal issued within the same time for draw the pension regularly from month month. Provident fund and gratu shall be paid if admissible to the app ant on the same computation. appeal is allowed to that extent or There will be no order as to costs.

Appeal partly allow

Report No 75, p. 01

R.N. Misra
Judge
Supreme Court of India

OBSERVATION

Re-appreciation of evidence in Bribery case not bar—Appeal by special leave—Conviction for acceptance of bribe—Overall assessment of matter disclosing that rosecution story was not true—Conviction set aside—Constitution of India Art. 136,

OBSERVED BY

D. A. Desai and
Ranganath Misra,

Hon'ble Judges Supreme Court of India.

IN

Criminal Appeal No. 50 of 1976, decided on 30-10-1984, between Khilli Ram ppellant v. State of Rajasthan, Respondent.

TEXT

Ranganath Misra, J.-This appel by special leave seeks to assail the onviction of the appellent under S. 61 of Indian Penal Code as also ection 5 (1) (d) and S. 5 (2) of the revention of Corruption Act, 1947 'Act' for short), and a consolidated entence of two years' rigorous impisonment. Apppellant's conviction by he Special Judge has been upheld in ppeal by thd Rajasthan High Court·

9. Appellant at the relevant ime was a Head Constable attached o the Bharawar Police Station withn the District of Bharatpur Proseution alleged that P.W. 2 Ram Swroop had given First Information eport of two offences but appropriate investigation was being done and harge-sheet was not being furnished the Court. He had approached Shankar Lal, Head Constable attached to the Police Station and had, on demand, paid him some money by way of bribe to expedite submission of the charge-sheet. Shankar Lal got transferred and appellant came in his place. When contacted, appellant also demanded money. P.W.2 thereupon informed the Anti Corruption Department about the demand and Kastoori Lal, Dy. Superintendent of Police attached to the Anti Corruption Department at Jaipur agreed to lay a trap. Details were fixed up and the trap was laid on March 30, 1969. An amount of Rs. 50/- was to be passed on as the bribe. Five currency notes each of Rs. 10/- denomination with marked initials were made over to P.W. 2 be given as bribe to the accused. For that purpose Ram Swaroop, P.W.

2, Kastoori Lal, P.W. 6, Prabhu Dayal, a literate Constable attached to the Anti Corruption Department, P.W. 1, accompanied by two Panch witnesses Girphari, P.W 3 and Gulji, P.W. 4 came to Bhusawar. Ram Swaroop come to the bus stand adjacent to the Police Station. Banshi Kumar, the waterman at the bus stand (P w. 1) was requested by P.W. 2 to infrom the accused at the Police Station that he (Ram Swaroop) had come prepared for the purpose as arranged earlier and accused should come and contact him Prosecution further alleged that the accused came pursuant to the request and the money was passed on and the payment of bribe was duly detected. In due course sanction was obtained and the case came up for trial before the Special Judge. Prosecution led evidence of 8 witnesses–five as indicated above and P.W. 5, the Superintendent of Police (Intelligence), Jaipur; P.W. 7, Kedar Nath, a literate Constable attached to the Bhusawar Police Station and P.W. 8, the Superintendent of Police, Bharatpur, was proved sanction for the prosecution. Certain documents were also produced to support the charge, Defence examined four witnesses in support of its stand that the accused had not received bribe and he was falsely implicated without any basis. The Special Judge accepted the prosecution case and convicted the appellant in the manner already indicated. His appeal to the High Court has failed.

3. Ordinarily the Supreme Court does not enter into reappreciation of evidence in exercise of its jurisdiction under Article 136 of the Constitution (see Ram Parkash Arora v. State of Punjab 1972 Cri LJ 1293). It is also true that in the case of State of Bihar v. Basawn Singh 1959 SCR 165:, a five Judge Bench of this Court has laid down that if any of the witnesses are accomplices, their evidence is admissible in law but the Judge should indicate in his judgemnt that he had the rule of caution in mind, namely the danger of convicting the accused on the uncorroborated testimony of an accomplice, and give reasons for considering it unnecessary to require corroboration; if, however, the witnesses are not accomplices but are merely partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as any other interested evidence is tested, and in a proper case, the Court may look for independent corroboration before convicting the accused person.

4. There are certain features in this case which appear to have been overlooked both by the trial Court as also the High Court. The two panch witnesses have not only turned hostile, but have disclosed facts which support the defence version of the 'incident. P.W. 2, the decoy witness has stated facts which probabilise the defence stand. Even the literate Constable/P.W. 7 who has not been declared hostile has supported the defence version. The place and the manner in which the

ribe is said to have been offered and ceived make the prosecution story tally opposed to ordinary human con- uct—a feature which the two Courts ave overlooked. We are of the opinion at this is a case where the evidence has be looked in to with a view to finding ut whether the prosecution case can all be accepted. The restriction on ppreciation of evidence in an appeal by pecial leave is a self-imposed one and not a jurisdictional bar. While we iterate that ordinarily this Court ould refrain from re-examining the vidence, in a case where serious inju- ice would be done if the evidence is ot looked into it would not be proper r the Court to shun attention by follo- ing the self-imposed restriction.

5. Prosecution has examined 8 itnesses in all. P. W. 5, as already oted, is the Superintendent of Police ntelligence) at Jaipur who is not a aterial witness at all. Similarly, P.W. being the Superintendent of Police of haratpur, is connected with sanction r prosecution and is not material for ny other purpose. This leaves six itnesses in the field. Of them, P Ws. and 6 are of the Anti-Corruption epartment, P. W. 1 being a literate onstable attached to that establishment nd P.W. 6 being the Dy. Superinten- ent of Police under whose active super ision the trap was laid. P.W. 2 is e decoy witness himself on whose eport the trap was laid. P.Ws. 3 and 4 re the Panch witnesses and P.W. 7 is literate Constable attached to the olice Station.

6. P.W. 2 is a supplier of water at the bus stand like D. W. 1. From his own evidence it appears that he has been involved in laying of traps. In his cross examination he has admitted : "before this occurrence, I took the Dy. S. P. for arresting another employee Shankerlal. The statement A V. in Ex. P. 8 was given by me in the presence of the Deputy Sahib". He seems to have made two other complaints before the police and those were found to be false and police had already decided to prosecute him under S. 182, I. P. C. It is after that incident that the present move had been taken. P. W. 2 has admitted in his cross-examination : "Prior to this I took the Deputy Sahib to get Shankerlal caught but Shankerlal could not be caught and the Deputy said that you have harassed me for nothing" It is the case of the prosecution that Shankerlal was the Head Constable attached to the police station and that P. W. 2 had negotiated with him, P.W. 3 who is Panch witness has stated that the Deputy Superintendent of Police had told him that Ram Swaroop was giving illegal gratification to Shankerlal. P.W. 3 was previously employed in the Police Department, and had been discharged. According to him, the name of the accused was never discussed and even at the time of payment it was Shankerlal who was supposed to receive the bribe. P.W. 3 has asid that he is not a literate person and his statement and signature had been extracted from him under pressure. P.W. 4, the other Panch witness has similarly stated that

he had been told that Shankerlal was to be bribed and he made no statement with reference to the accused. In view of this evidence it becomes doubtful whether the Panch witnesses had really anything to do with the offer of bribe to the present accused. Since P. W. 2 admitted the position that the Deputy Superintendent of Police had been taken previously in respect of a bribe to Shankerlal and the two Panch witnesses have referred to that incident, it appears logical to infer that these two witnesses were really referring to the other incident. The defence version seems to be that the trap had been arranged with reference to Shankerlal. Ram Swaroop on reaching the bus stand requested D. W. 1 to ask Shankerlal to come but since Shankerlal was absent from the Police Station, the accused who was the senior-most of the lot then available within the police station came out. This part of the defence story has been supported by P.W. 7 Kedar Nath, a Constable attached to the Police Station. He in his cross-examination has stated : "Banshi Kumhar said that Shankerlal, Head Constable is being called at the stand. There I, Babu Ram, Constable and Khilli Ram (accused) were Present. We said, 'Khilli Ram, you being the Head may go'. Accordingly he went." To that effect is the evidence of D.W. 1, the person whose services Ram Swaroop had admittedly taken to call the accused from the police station. He stated: "Shankerlal was sent for from the police station at 6 p. m. 2 years 20 days age. Then one more person was with him. I went to the police station Bhusawar. Shankerlal was not found there. The two constables and the accused present in the Court were there. On the advice of the police constables the accused accompanied me to the bus stand." The evidence of P. W. 7 and D. W. 1 thus clearly support the position we have indicated above. It is quite probably, therefore, that P. W. 2 had negotiated with Shankerlal only and so far as the accused is concerned there was no negotiation and he had come out to the bus stand after being told by D. W. 1 in the manner and circumstance indicated by P. W. 7 and D. W. 1. If that be so, implicating the accused for the offence of receiving bribe would be without any basis.

7. P. W. 2 stated in his evidence that the appellant had demanded a sum of Rs. 100/- . When this was pointed out to him in cross-examination he stated that the accused demanded Rs. 100/- from him for taking out the application and this was settled between them to be paid to the accused. This part of the story runs counter to the deposition of P. W. 6 who stated : "Ram Swaroop came to my office on 30-3-1969 and said that Shankerlal has been transferred and in his place khilli Ram, Head Constable has come and the letter has settled with me to accept bribe of Rs. 50." The discrepancy is indeed a material one in the facts of the case.

8. The defence of the appellant has all throughout been that he never

ived and bribe. P.W. 1 in his evide-
in chief has stated that Deputy
erintendent of Police demanded the
be amount to be taken out and the
used stated that he had not received
amount. To the same effect is the
lence of P.W. 2. This evidence of
Ws. 1 and 2 makes it clear that the
reaction of the accused when accos-
was a denial of receipt of any bribe.
t has been the consistent stand of
accused. He has reiterated the same
is examination under S. 342, Cr. P.
According to the defence version of
matter there was really no passing
any money. P. W 1, the Constable
ompanying the Dy. Superintendent
Police, according to the prosecution.
rched the person of the accused and
nd the five currency notes. There is
acceptable evidence that the Consta-
had given search of his person be-
he started searching the person of
accused. P.W. 6, the Dy. Superin-
dent of Police was at a distance. He
not seen the actual passing of the
ney. Once P. Ws. 3 and 4 the Panch
nesses did not support the prosecu-
case. the only evidence for the pas-
g of the money has to test is of P. Ws.
nd 2. Both of them were vitally in-
ested in the fate of the prosecution
would, therefore, be disposed to
port the prosecution case. We have
eady indicated that P.W. 2 was anxi-
to satisfy the police as he was about
face the prosecution under S. 182, I
C. for having made false allegations in
cases. The Deputy Superintendent
Police has stated that he had taken
P.W. 2 to task for having brought him once to Bhusawar on the allegation that Shankerlal was to receive the bribe and that had failed. In these circumstances it is quite likely that these two witnesses would go out of their way to support the prosecution version.

9. If Shankerlal was the person with whom P.W. 2 had negotiated in the matter of taking of the bribe, it would indeed be difficult to accept the position that the accused readily agreed to receive the amount when offered. The accused was, according to the prosecution evidence, in full uniform. He had been called up to the bus stand which is a public place. There is evidence to show that there were many people moving around and the area was crowded. There is also evidence that the place where P.W. 2 met the accused with the money was close to a hotel where people were standing. In such a surrounding a police man in uniform would ordinarily not accept a bribe. The Police station was not far away and if the accused wanted actually to receive the bribe he would try to choose a better environment for it than the one where the bribe is said to have been given Human compunction would not permit a man in the position of the accused to behave in the manner prosecution has pictured him to have. There is also evidence that the accused and P.W. 1 raised shouts that the bribe had been accepted before the amount was paid P.W. 3 has narrated this part of the story thus.

"There the Deputy Sahib and we all stood at one place and Ram Swaroop

(P. W. 2) and Prabhu Dayal (P.W. 1) went towards the police station Both had some talks. Prabhu Dayal remained this side and Ram Swaroop went inside the police station. Ram Swaroop returned and looked here and there. In the meantime Prabhu Dayal constable shouted that the money has been found, come on; come on ...."

P.W. 4 stated that he did not see anybody giving or taking illegal gratification. D. W. 1 has stated :

"I told pointing towards Ram Swaroop and his companions that they are summoning. Thereupon the companion of Ram Swaroop (referring to Prabhu Dayal) shouted near the 'Imli' tree that 'caught, caught'. He took out from the pocket of his pant notes like and putting them in his hand shouted, "caugh caught". D W. 3 the hotelier has stated : "I and the Inspector went together, then the notes were in the hand of a Constable." He has further said that the Constable was shouting that the amount had been recovered from Khilli Ram. D.W.4, an independent witness described this part of the story thus : "At the same time, Banshi waterman and Khilli Ram accused present in the Court came from the side of police Station. The man standing near Ram Swaroop (obviously Prabhu Dayal), shouted, 'caught, caught'. He took out the currency notes of Rs. 50/-from his (witness) pocket and raised this alarm." In cross-examination this witness stated that the person who raised the cry said that the notes have been recovered from Khilli Ram was saying that he did not take th notes

10. Two other aspects are relevar to be indicated here According to P.W 1, kastoori Lal. The Deputy Superinter dent of Police ordered him to take th search of the accused whereupon h proceeded to do the needful. P.W. 2 however, stated that it was the Dy Superintendent of Police who recovere the notes from the accused. P.W. 6 ha however indicated that under his order search was conducted by P.W. 1. Ther is again material discrepancy as to fror where the amount was recovered. P.W 2 has stated that the accused kept th notes of Rs. 50/-given by him in the le side pocket of his shirt. P.W. 6 ha stated: "When Prabhu Dayal conducte the search of the accused, Exts P-1, 2 3, 4 and 5 notes of the denomination c Rs. 10/-each were found out from th right side pocket of the shirt of th accused." Ext. P-1 is the recover memo purported to have been prepare at the spot It indicates: "Then th settled five currency notes of th denomination of Rs. 10/- each wer recovered from the right hand pocke of the worn shirt of khaki nuiform." There is thus a discrepancy as to th place from where recovery was made.

11. It was pointed out by thi Court in Raghubir Singh v. State c Punjab 1976 Cri LJ 172:

"Where a trap is laid for a publi servant, it is desirable that the marke currency notes which are used for th purpose of trap are treated with pheno lphthalein powder so that the handling of such marked currency notes by the public servant can be detected by chemical process and the Court does not have to depend on oral evidence which is sometimes of dubious charcter for the purpose of deciding the fate of the public servant."

12. Ordinarily in cases of this type the power treatment is made. There is no material at all on the record to explain why such a process was not followed in the instant case even though detection is alleged to have been handled by experience people of the Anti-Corruption Department. P.W. 6 was a very senior officer and in fact by the time the trial took place, he had retired from service. It is difficult for us to accept the position that he was not aware of the powder treatment. It has been in vague for well over three decades now. If such dowder treatment had been made, the passing of the bribe would indeed not have been difficult to be proved.

13. We are prepared to agree with counsel for the State of Rajasthan that ordinarily a case of this type is difficult to prove and the law is settled that even the ucorroborated testimony of trap witnessee can be acted acted upon as indicated by this Court in the case of Prakash Chand V.State (Delhi Administratration) (1979) 2 SCR 330 and Kishan Chand Mangal V. State of Rajasthan (1987) 3 SCC 466, but in the present case the evidence of the panchas is not available to support the prosecution case. There is discrepancy in many material aspects. The prosecution story is opposed to ordinary human conduct. The discrepancies go to the root of the matter and if properly noticed would lead any Court to discard the prosecution version. Without powder treatment, for the absence of which no explanation has been advanced, the prosecutiou story becomes liable to be rejected. An overall assessment of the matter indicates that the story advanced by the prosecution is not true and the defence version seems to be more probable. In these circumstances we are of the view that sufficient material has been brought out to merit interference in this appeal. We allow the appeal, set aside the conviction of the appellant and acquit him. He is discharged from his bail bond.

Appeal allowed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

ɔort No. 76, p. 01

R. S. Pathak
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art 311 (2),–Termination of service of temporary Sub-ɔector of Police—Order based on mere allegations and on unspecific and vague ınds—Order liable to be quashed—Decision of Allahabad High Court Reversed. rmination of Service—Unspecific and vague grounds)

OBSERVED BY

R. S. Pathak; D. P. Madon
and M. P. Thakkar

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 621 (N) of 1975 decided on 9-11-1984, between Nepal Singh, ɔellant v. State of U. P. and others, Respondents.

TEXT

Pathak, J. :— This appeal by spe- leave is directed against the judgm- and order of the Allahabad High ırt dismissing the appellant's writ tion against an order terminating services.

2. The appellant, Nepal Singh, was loyed in a temporary capacity as -Inspector of Police. He was serving Shahjahanpur in 1968 when the erintendent of Police, Shahjahan- initiated disciplinary proceedings er S. 7 of the police Act against on the charge that while posted ?ithoragarh he had, in November, 4, contracted a second marriage le his first wife was alive, and as was done without obtaining the r permission of the Government the ellant had violated Rule 29 of the . Government Servants' Conduct Rules, 1956. The appellant filed a reply and denied the charge. The oral testimony of about twelve witnesses for the prosecution and an almost equal number for the defence was recorded. But in January, 1970 the Superintendent of Police, Shahjahanpur wrote to the Deputy Inspector General of Police, Bareilly Range that as the act alleged against the appellant related to the district of Pithoragarh the disciplinary proceedings taken by him would be without jurisdiction unless there was an existing order transferring the proceedings from pithoragarh to Shahjahanpur. Accordingly, on March 12, 1970, the Deputy Inspector General of Police, Bareilly Range ordered the quashing of the disciplinary proceedings. It appears that no further action was taken and the proceedings were dropped.

3. About this time the Inspector General of Police, Uttar Pradesh issued a circular letter to the Superintendents of Police throughout the State requiring them to submit a list of Sub-Inspectors who fell in any of the following three categories :

"1. Whose reputation and integrity is very low and/or

2. Who are generally involved in scandals, like drinking, immorality, etc. which blackens the face of the U.P Police, and/or

3. Everywhere they are a big problem because they encourage gambling, excise offences, brothels, criminals, etc.

4. The Superintendent of Police, Shahjahanpur drew up a list of such Sub-Inspectors on February 5, 1970 and directed them to appear before the Deputy Inspector General of Police, Bareilly Range on February 10, 1970 during his inspection of the district. The list included the name of the appellant with the note :

"A corrupt Officer, who is not straight-forward, Married two wives against Government Servants' Conduct Rules. Does not do his duty sincerely. Wherever he goes creates problem."

5. Thereupon, on April 27, 1970 the Deputy Inspector General of police, Bareilly Range, made an order purporting to be under the rules published by Notification No. 230/11-B-1953 dated January 30, 1953 that the appellant's services were not required any more and were terminated with one month's pay in lieu of notice.

6. The appellant filed a writ petition in the High Court against the orde terminating his services and on November 17, 1972 a learned single Judge o the Allahabad High Court dismissed th writ petition holding that the order o termination was passed bona fide, that i was an order of termination simpliciter and that it did not constitute the remova of the appellant from service. That vie was endorsed, on appeal filed by th appellant, by a Division Bench of th High Court by its judgment and orde dated March 13, 1973 The learned judges have taken the view that the case i respect of the appellant was covered b the first and third of the three categories enumerated earlier, that is to say, his integrity was low and he was a problem officer "who encouraged gambling, excise offences, brothels, criminals, etc." The allegation that he had married two wives against the Government Servants' Conduct Rules, 1956, the learned Judges said, did not bring him within any of the three categories as, in their view, the second marriage without prior permission of the Government gave rise merely to a technical charge. In view of the opinion that the impugned order was ex-facie innocuous and could not be said to cast any stigma or be regarded as imposing the punishment of dismissal or removal, the learned Judges dismissed the appeal.

7. It seems to us that the High Court has fiailed to consider the true content of the case set up by the appellant. The entire thrust of the appellant's case is that in terminating the appellant's services the competent authority

treated him unfairly and arbitraily. It is well settled that in dealing with a Government servant must the State conform to the constitutional requirements of Arts. 14 and 16 of the Constitution. An arbitrary exercise of power by the State violate those constitutional guarantees, for a fundamental implication in the guarantee of equality and of protection against discrimination is that fair and just treatment will be accorded to all, whether individually or jointly as a class. When a Government servant satisfies the Court prima facie that an order terminating his services violates Arts. 14 and 16, the competent authority must discharge the burden of showing that the power to terminate the services was exercised honestly and in good faith, on valid considerations, fairly and without discrimination.

8. The High Court has observed that within the framework of the three categories defined in the Inspector General's circular the allegation of a second marriage by the appellant was of no significance, and that the principal intent in terminating the appellant's services was to rid the State of an unsuitable officer. The Superintendent of Police has noted that the appellant created porblems wherever he went, but it is not disclosed in the affidavits what were those "Problems". It is not shown that the problems were of the nature specifically indicated by the circular issued by the Inspector General of Police. We are unable to conclude from material before us that the Superintendent of Police applied his mind to the requirements of the case.

9. The Superintendent of Police has also commented that the appellant was a corrupt officer who was not straight forward (whatever that might mean). On that we have this to say. Where the services of a Government servant on temporary appointment are terminated on the ground that his reputation for corruption makes him unsuitable for retention in the service, the reputation for corrupt behaviour must be based on something more than a mere allegation. The other grounds mentioned in the report of the Superintendent of Police, which impressed the High Court, appear to us to be equally vague and unspecific. The State, and for that matter any statutory employer, must take great care when proceeding to terminate a career on the ground of unsuitability, to ensure that its order is founded in definable material objectively assessed and relevant to the ground on which the termination is effected.

10. Proceeding from there, we may advert to a further aspect of the case. It would seem that the dominating factor which influenced the mind of the Deputy Inspector General of Police was the allegation that the appellant had married a second wife against the Government Servants' Conduct Rules. It is clear that a fullfledged enquiry was instituted into the matter, evidence was recorded but before any findings could be rendered the enquiry was dropped for want of jurisdiction. No

attempt was made thereafter to institute a proper enquiry by the appropriate authority. In the circumstances, it was not open to the Superintendent of Police to mention in his report, as a statement of fact, that the appellant had married a second time against the Government Servants' Conduct Rules. With the dropping of the enquiry the allegation remained unverfied We may observe that where allegations of misconduct are levelled against a Government servant, and it is a case where the provisions of Art. 311(2) of the Constitution should be applied, it is not open to the competent authority to take the view that holding the enquiry contemplated by that clause would be a bother or a nuisance and that therefore it is entitled to avoid the mandate of that provision and resort to the guise of an ex facie innocuous termination order. The Court will view with great disfavour any attempt to circumvent the constitutional provsion of Art. 311(2) in a case where that provision comes into play.

11. For all the aforesaid reasons, we are unable to uphold the judgment and order of the High Court, and in the result the appeal must be allowed.

12. The appeal is allowed and the order dated April 27, 1970 of the Deputy Inspector General of Police, U. P. Bareilly Circle is quashed. The appellant is entitled to be treated as continuing in service without interruption. It will be open to the authorities to take fresh proceedings against the appellant in accordance with law. It will also be open to them to determine whether the appellant was gainfully employed for the purpose of considering the extent of relief, if any, to which he may be entitled pursuant to our present order quashing the impugned order. In the circumstances, there is no order as to costs.

Appeal allowed.

R.S. Pathak
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Arts. 14, 16 and 311—Promotion—Classification—Opening of separate avenue of promrotion on temporary basis only for those Upper Division Clerks and Selection Grade Clerks in A.G's office who had put in 20 years of service nd exhausted all chances of appearing at Subordinate Accounts Service Examination r had become ineligible to appear at it—Classification is reasonable. (Public Servant —Promotion classificatien).

OBSERVED BY
R.S. Pathak and
V. Balakrishna Eradi,

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 1033 of 1979 decided on 13-11-1984, between Debranjan Ray nd others, Appellants v. Comptroller and Auditor General of India and others, Respondents.

TEXT

Pathak, J,:—This appeal by speial leave raises an interesting question especting the recruitment of Upper Division Clerks for appointment as Accountants in the office of the Accountant General, West Bengal.

2. It appears that at one time all olders of supervisory posts in the ffice of the Accountant General, West engal were required to pass the Subordinate Accounts Service Examination. he examination consisted of two parts. very eligible employee was entitled to ve chances to pass the part I examinaon and having passed that he had to ass the Part II examination before e crossed the age of 45 years. In 1966 ne Comptroller and Auditor General f India considered it necessary to take measures for improving the working of the offices of the Civil Accountants General because it had been reported by the Directors of Inspection that the accounting-cum-administrative work was suffering considerably and the quality of local inspection was poor. It was also felt that some accounting-cum-administrative supervisory posts could be filled by clerks who had not been able to pass the Subordinate Accounts Service but who had long years of experience and a good record of service and possessed sufficient administrative ability. It was expected that while this measure would afford an avenue of promotion to Upper Division Clerks who had no hope of entering the regular channel of promotion through the sub-

ordinate Accounts Service examination, it would release more Subordinate Accounts Service accountants for inspection work and other important assignments requiring greater technical knowledge and application. Accordingly, a scheme was framed by an Office Order No. TM 96 dated June 8, 1966 for filling up some of the posts of a purely accounting-cum-administrative nature by Upper Division Clerks (including Selection Grade Clerks) were who not members of the Subordinate Accounts Service. They were to be known as Accountants. This was to be effected without reducing the total number of existing posts for which the Subordinate Accounts Service. men were eligible. The scheme provided that in view of the acute shortage of Subordinate Accounts Service personnel for intensive local audit of a large number of schemes and programmes then in operation the offices would be reorganised in such a way that passing the Subordinate Accounts Service Examination would not be a necessary qualification for holding supervisory posts where the work involved was entirely of an accounting-cum-administrative nature and the knowledge of rules and accounts of a very high standard was not required. It was stipulated that Upper Division Clerks and Selection Grade Clerks who had not passed the Subordinate Accounts Service Examination should be taken on the basis of their experience, administrative ability and a good record. There was no reservation of posts for those Clerks. The scheme only made them eligible for holding those posts. To be eligible the Upper Division Clerks and Selection Grade Clerks should have put in not less than 20 years of service in the Upper Division Clerical Cadre and should have exhausted all chances of appearing in the Subordinate Accounts Service Examination or by reason of being over 45 years of of age were no longer eligible to appear at the Subordinate Accounts Service Examination. The appointments were temporary and their continuance would depend upon the satisfactory performance of their duties assessed on the basis of six monthly reports It was made clear that they would not be eligible for promotion as Assistant Accounts Officers. It seems that a fair number of such appointments were made with effect from June 15, 1966 by the Accountant General, West Bengal by his letter No. ADMN/37 dated June 9, 1966.

3. The appellants who had originally been appointed as Upper Division Clerks in the office of the Accountant General, West Bengal and at the relevant time were permanent Selection Grade Clerks on their reversion from temporary appointments as Clerks-in-charge in different sections of the office of the Accountant General, West Bengal, filed a writ petition challenging the appointments under the scheme alleging that they were entitled to be considered for appointment to those posts. They contended that in confining the zone of eligibility to Upper Division Clerks who had

passed the Subordinate Accounts
vice Examination the scheme brou-
: about an invidious discrimination
ich was violative of Arts. 14 and
of the Constitution.

4. By his judgment and order
ted June 2, 1970 a learned single
dge of the Calcutta High Court allo-
d the writ petition and quashed the
eme. An appeal by the Comptro-
: and Auditor General of India was
owed by a Division Bench of the
gh Court by its judgment and order
ted July 6, 1978. It set aside the
lgment of the learned single Judge
d dismissed the writ petition.

5. Before us, learned counsel for
: appellant raised substantially the
ne point which was pressed before
: High Court in the writ petition.
e principal contention is that the
eme violates Arts. 14 and 16 of
: Constitution because in defining
conditions of eligibility there is no
sonable basis for discriminating
ween those who can no longer appear
the Subordinate Accounts Service Ex-
ination and those who can still do

6. It is evident that the scheme
s intended to provide a separate
enue of promotion for those Upper
vision Clerks who had put in 20
rs of service or more in their cadre-
d who had exhausted all their chan-
of appearing at the Subordinate Ac-
unts Service Examination for promo-
n to supervisory post, or who having
ssed the age of 45 years, were
longer eligible to appear at that
Examination. These indicia distinguished that category of Upper Division Clerks from others. The entire purpose of the scheme wasto provide an avenue of promotion for those Upper Divison Clerks who because they were no longer eligible to appear at the Subordinate Accounts Service Examination would be compelled otherwise to stagnate in their existing cadre. An incentive was thus provided to them. There was the hope that efficiency and industry in their present posts would be rewarded by promotion. If the scheme had been thrown open to Upper Division Clerks who still enjoyed the possibility of recruitment to the Subordinate Accounts Service, the intent underlying the scheme would have been defeated. The appellants, although senior in length of service to the respondents promoted under the scheme, were still eligible to appear in the Subordinate Accounts Service Examination and the opportunity of advancement in their regular promotinal channel was still available to them. It may be observed that promotion under the scheme was purely temporary and further continuance on the promotional post depended upon the satisfactory performance of duties monitored every six months. They were barred from promotion as Assistant Accounts Officers, and therefore after promotion to the supervisory posts of Accountants under the scheme they were not entitled to further advancement or promotion to any higher post. On the other hand, the appellants, in the event of their success at the Subordinate Accountants

Service Examination, were entitiled to substantive appointment by promotion to supervisory posts, and thereafter eligible for further promotion to still higher posts. We are satisfied that in providing a separate channel of promotion governed by its own conditions of eligibility the impugned scheme follows a clearly defined classification having a reasonable nexus to the object of the classification. Those who fall outside the scheme cannot complain of discrimination, for intelligible differentia exists between those included within the scheme and those outside it. The framing and implementation of such a scheme falls within the scope of administrative policy, and having regard to the object underlying the cheme as well as its careful definition we see no basis for complaint by the appellants.

7. Our attention was invited by learned counsel for the appellants to State of Jammu and Kashmir v. Triloki Nath Khosa (1974) 1 SCR 771 : (AIR 1974 SC 1) but learned counsel has been unable to show how that case is relevant on the facts of the instant case.

8. The appeal fails and is dismissed but, in the circumstance there is no arder as to costs.

Appeal dismissed.

eport No. 78, p. 01

V.D. Tulzapuakar
Judge
Supreme Court of India

OBSERVATION

Retirement dues—Delay in payment—Liability of Govt. —To pay interest on ma-
et rate—Commences from expiry of two months from date of retirement—
ovt. employee—Delayed payment of retirement dues due to non-production of
st pay certificate by retiree—Suit for interest—Non production of certificate
ld, was due to lapse of issuing authority—Govt. liable to pay interest. (Treas-
y Code (Bom), R. 186 -- Payment of Gratuity Act, 1972, S.4, Constitution of India
ts 311, 300A

OBSERVED BY

V.D. Tulzapurkar
and V. Balakrishna Eradi,
Hon'ble Judges Supreme Court of India.

IN

Sp Leave Petn. (Civil) No. 9425 of 1984, decided on 17-12-1984, between
ate of Kerala and others, Petitioners v.M. Padmanabhan Nair, Respondent.

TEXT

Judgment:- Pension and gratuity
e no longer any bounty to be dis-
buted by the Government to its em-
oyees on their retirement but have
come, under the decisions of this
ourt, valuable rights and property
their hands and any culpable del-
in settelment and disbursement the-
of must be visited with the penal-
of payment of interest at the cu-
ent market rate till actual payment

2. Usually the delay occurs by
ason of non-production of the L.P.
(Last Pay Certificate and the N.
C. (No Liability Certificate) from
e concerned Departments but both
ese documents pertain to mat-
s, records whereof would be with
e concerned Government Departme-
s. Since the date of retirement of every Government servant is very much in known advance we fail to appreciate why the process of collecting the requisite in formation and issuance of these two documents should not be completed at least a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following day and pension at the expiry of the following month. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be overemphasised and it would not be unreasonable to direct that the liability to pay penal interest on these dues at the current market rate should commence at the expiry of two months from the date oi retirement.

V.D. Tulzapurkar
Judge
Supreme Court of India

3. The instant case is a glaring instance of such culpable delay in the settlement of pension and gratuity claims due to the respondent who retired on 19-5-1973. His pension and gratuity were ultimately paid to him on 14-8-1975, i e. more than two years and 3 months after his retiremend and hence after serving lawyer's notice he filed a suit mainly to recover interest by way of liquidated damages for delayed payment. The appellants put the blame on the respondent for delayed payment on the ground that he had not produced the requisite L P.C. (Last Pay Certificate) from the Treasury Officer under Rule 185 of the Treasury Code. But on a plain reading of Rule 186, the High Court held and in our view rightly that a duty was cast on the Treasury Officer to grant to every retiring Government servant the last pay certificate which in this case had been delayed by the concerned officer for which neither any justification nor explanation had been given claim for interest was, therefore, rightly decreed in respondent's favour.

4. Unfortunately such claim for interest that was allowed in respondent's favour by the District Court and confirmed by the High Court was at the rate of 6 per cent per annum though interest at 12 per cent had been claimed by the respondent in his suit However, since the respondent acquiesced in his claim being decreed at 6 per cent by not preferring any cross objections in the High Court it would not be proper for us to enhance the rate to 12 per cent per annum which was otherwise inclined to grant.

5. We are also of the view that the State Government is being rightly saddled with a liability for the culpable neglect in the discharge of his duty by the District Treasury Officer who delayed the issuance of the L P.C. but since the concerned officer had not been impleaded as a party defendant to the suit the Court is unable to hold him liable for the decretal amount. It will, however, be for the State Government to consider whether the erring official should or should not be directed to compensate the Government the loss sustained by it by his culpable lapses. Such action if taken would help generate in the officials of the State Government a sense of duty towards the Government uner whom they serve as also a sense of accountability to members of the public.

Order accordingly.

.eport No. 79, p. 01

D. A. Desai
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art. 136—Service matter—Dismissal of petitioner employee 1 grounds of misconduct—Petitioner shown to be guilty of suppression of material ict which would weigh with any employer in giving him employment—Held, case did ɔt merit consideration under Art. 136

(B) Industrial Disputes Act (14 of 1947), Sch. 2 Items 1, 3, 6—Dismissal of nployee for misconduct—Suppression of material fact in application for employment leged to be misconduct—Alleged misconduct not falling within the enumerated misɔnducts in service regulations or standing orders—Order is illegal.

OBSERVED BY

D. A. Desai and
Ranganath Misra,

Hon'ble Judges, Supreme Court of India.

IN

Spl. Leave Petn. (Civil) No. 5523 of 1984, decided on 14-1-1985, between Rasial Vaghajibhai Patel, Petitioner v. Ahmedabad Municipal Corporation and anoth-, Respondents.

TEXT

Dasai, J. : — Petitioner is shown to guilty of suppression of a material ct which would weight with any emplrer in giving him employment and erefore, the case of the petitioner does ɔt merit consideration under Art. 136 the Constitution and his petition for ecial leave to appeal against the decion of a Division Bench of the Gujarat igh Court in Special Application No. 49 of 1981 dated November 28, 1983 ust accordingly fail but this short epie became a compelling necessity in ɛw of the statement of law appearing the judgment of the High Court hich if permitted to go uncorrected, me innocent person may suffer in future. This is the only justification for this short order.

2. The petitioner on his application was recruited in the Sales Tax Department on September 30, 1950 and at the relevant time he was working as Sales Tax Inspector. By an order dated January 31, 1964 of the Commissioner of Sales Tax, Gujarat State, the petitioner who was at the relevant time working as Sales Tax Inspector was charged with misconduct of gross negligence and acting with gross impropriety in demanding illegal gratification, and as these charges were held proved, the Commissioner of Sales Tax imposed a penalty of removal from service. This is not in dis-

pute and therefore it can be safely stated that the petitioner was removed from the service of the Sales Tax Department on account of the proved misconduct.

3. After being removed from the Sales Tax Department, the petitioner joined service in Bhatka Vallabh Dhola College, Ahmedabad ('college' for short) on May 15, 1964. While continuing his service with the college, the petitioner applied on January 13, 1968 for the post of Head-Clerk with Ahmedabad Municipal Corporation. The application had to be made in the prescribed from, Column No. 14 of which required the applicant to state whether the applicant had been removed from service and if so, reasons for removal and if the applicant had voluntarily left previous service, reasons for leaving the service should be stated. While answering this column, the petitioner stated that he had served in the Sales Tax Department from September 30, 1959 to January 31, 1964 and that he has resigned from service due to transfer. It thus appeared that the petitioner was guilty of suppress veri and suggestio falsi inasmuch as he suppressed the material fact that he was removed from service on the ground of proved misconduct and that he made a false suggestion that he had voluntarily left service because of transfer. Ultimately when these facts came to light, he was charge-sheeted and removed from service. A petition to the Labour Court was rejected on the ground that the misconduct alleged against the petitioner is proved. His writ petition to the High Court proved unsuccessful. Hence he filed this petition for special leave.

4. The High Court while dismissing the petition held that even if the allegation of misconduct does not constitute misconduct amongst those enumerated in the relevant service regulations yet the employer can attribute what would otherwise per se be a misconduct though not enumerated and punish him for the same. This proposition appears to us to be startling because even though either under the Certified Standing Orders or service regulatiations. It is necessary for the employer to prescribe what would be the misconduct so that the workman/employee knows the pitfall he should guard against. If after undergoing the elaborate exercise of enumerating misconduct, it is left to the unbridled discretion of the employer to dub any conduct as misconduct, the workman will be on tenterhooks and he will be punished by ex post facto determination by the employer. It is a well settled canon of penal jurisprudence that removal or dismissal from service on account of the misconduct constitutes penalty in law that the workmen sought to be charged for misconduct must have adequate advance notice of what action or what conduct would constitute misconduct. The legal proposition stated by the High Court would have necessitated in-depth examination, but for a recent decision of this Court in Glaxo Laboratories v. Presiding Officer, Labour Court, Meerut (1984) 1 SCR 230 in which this Court specifically repelled an identical contention advanced by Mr.

hanti Bhushan, learned counsel who ppeared for the employer in that case bserving as under:

"Relying on these observations, Ir. Shanti Bhushan urged that this ourt has in terms held that there can e some other misconduct not enumer- ted in the standing order and for which ne employer may take appropriate ction. This observation cannot be ewed divorced from the facts of the ise. What started in the face of the ourt in that case was that the employer ıd raised a technical objection noring the past history of litigation etween the parties that application ıder Sec. 33A was not maintainable. is in this context that this Court oserved that the previous action might ıve been the outcome of some isconduct not enumerated in the anding order. But the extracted oservation cannot be elevated to a oposition of law that some miscond- t neither defined nor enumerated d which may be believed by the nployer to be misconduct ex post cto would expose the workman to a enalty. The law will have to move two nturies backward to accept such a nstruction. But it is not necessary to so for because in Salem Erode ectricity Distribution Co. Ltd. v. eir Employees Union (1966) 2 SCR 8, this Court in terms held that the ject underlying the Act was to troduce uniformity of teams and nditions of employment in respect of orkmen belonging to the same tegory and discharging the same or similar work under an industrial establishment, and that these terms and conditions of industrial employment should be well-established and should be known to employees before they accept the employment. If such is the object, no vague undefined notion about any act, may be innocuous, which from the employer's point of view may be misconduct but not provided for in the standing order for which a penalty can be imposed, cannot be incorporated in the standing orders. From certainty of conditions of employment, we would have to the days of hire and fire which reverse movement is hardly justified. In this connection, we may also refer to Western India Match Co. Ltd.v. Workmen (1974) 1 SCR 434 in which this Court held that and condition of service if inconsistent with certified standing orders, the same would not prevail and the certified standing orders would have precedence over all such agreements. There is really one interesting observation in this case which deserves noticing. Says the Court:

"In the sunny days of the market economy theory people sincerely believed that the economic law of demand and supply in the lobour market would settle a mutually beneficial bargain between the employer and the workman. Such a bargain, they took it for granted, would secure fair tair terms and conditions of employment to the workman. This law they venerated as natural law. They had an abiding faith in the verity of this law. But the experience of the

D. A. Desai
Judge
Supreme Court of India

working of this law over long period has belied their faith."

Lastly we may refer to Workmen of Lakheri Cement Works Ltd v. Associated Cement Companies Ltd. (1970) 20 Fac LR 243. This Court repelled the contention that the Act must prescribe the minimum which has to be prescribed in an industrial establishment, but it does not exclude the extension otherwise. Relying upon the earlier decision of this Court in Rohtak Hissar District Electricity Supply Co. Ltd. v. State of Uttar Pradesh (1966) 2 SCR 863 the Court held that everything which is required to be prescribed with precision and no argument can be entertained that something not prescribed can yet be taken into account as varying what is prescribed. In short it cannot be left to the vagaries of management to say ex post facto that some acts of omission or commission nowhere found to be enumerated in the relevant standing order is nonetheless a misconduct not strictly falling within the enumerated misconduct in the relevant standing order but yet a misconduct for the purpose of imposing a penalty. Accordingly, the contention of Mr. Shanti Bhushan that some other act of misconduct which would per se be an act of misconduct though not enumerated in S. O. 22 can be punished under S. O. 23 must be rejected. It is thus well-settled that unless either in the Certified Standing Order or in the service regulations an act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct as misconduct and punish the workman even though the alleged misconduct would not be comprehended in any of the enumerated misconduct.

5. The High Court fell into error when it observed that:

"The conduct of the petitioner is suppressing the material facts and misrepresenting his past on the material aspect cannot be said to be a good conduct. On the contrary it is unbecoming of him that he should have deliberately suppressed the material fact and tried to obtain employment by deceiving the Municipal Corporation. It is clearly a misconduct."

After thus holding that the suppressio veri and suggestio falsi would constitute misconduct, the High Court held even if it dose not fall in any of the enumerated misconducts, yet for the purpose of service regulation, it would nonetheless be a misconduct punishable as such We are unable to accept this view of law and it has to be rejected.

6 Having clearly restated the legal position, we reject this special leave petition.

Special leave petition dismissed.

ort No. 80, p. 01

V. D. Tulzapurkar
Judge
Supreme Court of India

OBSERVATION

Contract Work—Contract Act (9 of 1972), **Ss. 55, 73—Constitution of India, . 299—Govt.** Contract—**Work to be completed within one year—Contractor uested to spread over work for two years or more due to less bndget provision—tractor not intimated by Govt. regarding extra payment—Contractor on comple- of work can be granted extra payment at increased rates.**

OBSERVED BY

V.D. Tulzapukar
and V. Khalid,
Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 316 (N) of 1971 decided on 6-2-1985, between Hyderabad nicipal Corporation, Appellant v. M. Krishnaswami Mudaliar and another, pondents.

TEXT

udgment:—The only question vehemly argued by counsel for the appellant his appeal was that the respondent intiff was not entitled to claim 20 cent extra over and above the rates ginally agreed upon between the ties under the suit contract Ex A-I.

2. Under Ex. A-I drainage works CSIR Laboratory at Uppal was rusted to the respondent-plaintiff and der the terms of the contract the work s to be completed by the plaintiff hin a period of one year i. e., from h March 1951 to 25th March 1952. mittedly at the instance of the Executive Engineer P.W.D due to financial ficulties less budget having been proled for in the year 1951-52 the plain- was requested to spread over the rk for two years more, that is to say to complete the same in three years but the respondent-plaintiff was agreeable to spread over the work for two years more as suggested on condition that extra payment will have to be made to him in view of increased rates of either material or wages. The Government did not intimate to the respondent-plaintiff that no extra payment on account of increased rates would be paid to him or that he will have to complete the work on the basis of original rates. In fact no reply was sent by the Governmet and a steadied silence was maintained by the Government in regard to the respondent-plaintiff's demand for extra payment, inspite of several reminders in that behalf, till the plaintiff actually completed the work during the spread over period and only when after completicn of work the plaintiff-respon-

dent submitted his final bill claiming 20 per cent extra over and above the rates originally agreed upon between the parties the Government stated that he was not entitled to increased rates. After considering the correspondence exchanged between the parties and the other material on record the High Court has taken the view that the government was liable to make extra payment for the work done as there was no dispute that the rates of material, etc had increased during the extended period of two years and plaintiff was entitled to such extra payment. After considering the relevant material on record we are of the view that both in equity and in law the plaintiff contractor is entitled to receive extra payment and the High Court was right in deciding the question in respondent-plaintiff's favour. Since subsequent to the entering into the agreement Ex. A-1 the Drainage Division was transferred from P. W.D. to Hyderabad Municipal Corporation the liability to make this extra payment in our view has been properly saddled on the appellant Corporation.

3. The other point which was faintly urged by counsel for the appe ant was in regard to interest claim by the respondent-plaintiff on t balance of the amount due to him b which had wrongly been retained the Department. Counsel urged th under clause 27 of the contract it w provided that "the contractor shall n be entitled to interest upon any pa ments in arrears or upon any balan which may on final settlement of h accounts be found due to him." In o view the reliance on this clause is no avail to the appellant for the simp reason that this clause will be applicab provided the work was completed acco ding to the specifications and the tin schedule fixed in the original contra Moreover in the instant case plainti had issued notice claiming interst und the Interest Act and the High Cou has, in modification of Trial Court decree, awarded interest from the da of notice till payment The claim f interest, therefore, was rightly allowe

4. In the result the appeal is di missed but there will be no order as costs.

Appeal dismisse

V. Balakrishna Eradi
Judge
Supreme Court of India

OBSERVATION

(A) Constitution of India, Art. 311 (1)—Order of suspension passed against
ovt servant—Art. 311 (1) not attracted.

(B) Orissa Civil Services (Classification, Control and Appeal) Rules (1962), **Rr.**
2 and 11—Forester appointed by Conservator of Forests placed under suspension by
istrict Forest Officer—Validity.

OBSERVED BY

D. A. Desai, A. P. Seen
and V. Balakrishna Eradi,
Hon'ble Judges, Supreme Court of India.

IN

Civil Appeals Nos. 200 (N) and 201 of 1971, decided on 22-2-1985, between
ate of Orissa and others, Appellants, v. Shiva Parashad Das, Respondent.

And

State of Orissa and others, Appellants v. Ram Prashad, Responedent.

TEXT

Bąlakrishna Eradi, J. :— In these
vo appeals filed by Special leave aga-
st two judgments of the Orissa High
ourt the question raised is identical
ımely whether an order of suspension
om service passed against a Govern-
ent servant falls within the scope and
ırview of Art. 311 of the Constitution.
he judgment appealed against the Civil
ppeal No. 201 of 1971 is prior in
oint of time and in the judgment under
hallenge in C. A. No. 200 of 1971 the
igh Court has merely followed the
rmer judgment. We shall, therefore,
fer only to the facts relating to C. A.
o. 201 of 1971.

2. The respondent Shri Ram Par-
ad was appointed as a Forester by the
onservator of Forests, Berhampur,
istrict Ganjam, on 17-7-1952. Subsequently while working as a Forester under the District Forest Officer. Ghumsur North Division the respondent was placed under suspension by an order dated 26-2-1969 passed by the said District Officer, pending enquiry into charges of negligence of duties. The respondent thereupon filed a Writ Petition in the High Court of Orissa under Art. 226 of the Constitution challenging the order of suspension passed against him on the ground that it was made in contravention of Art. 311 of the Constitution as well as R. 12 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 (hereinafter called the 'Rules'). The High Court by its impugned judgment allowed the Writ petition and quashed the order of suspension holding the same to be in

contravention of Art. 311 (1) of the Constitution. The High Court took the view that inasmuch as the respondent had been appointed as Forester by the Conservator of Forests, he could not have been validly suspended from service by the District Forest Officer, who is an authority subordinate to the Conservator of Forests. The correctness of this view taken by the High Court is called in question by the appellant—the State of Orissa—in these two appeals.

3. An order of suspension passed against a Government servant pending disciplinary enquiry is neither one of dismissal nor of removal from service within Art. 311 of the Constitution. This position was clearly laid down by a Constitution Bench of this Court in Mohammad Ghouse v. State of Andhra, 1957 SCR 414 : It is unfortunate that this decision was not brought to the notice of the learned Judges of the High Court, Clause (1) of Art. 311 will get attracted only when a person who is a member of Civil Service of the Union or an All India Service or a Civil Service of a State or one who holds a civil post under the Union or a State is 'dismissed' or 'removed' from service. The provisions of the said clause have no application whatever to a situation where a Government Servant has been merely placed under suspension pending departmental enquiry since such action does not constitute either dismissal or removal from service. The High Court was, therefore, manifestly in error in quashing the order of suspension passed against the respondent on the ground that it was violative of clause (1) of Art. 311 of the Constitution.

4. Rule 12 of the Rules lays down that the appointing authority or any authority to which it is subordinate or any authority empowered by the Governor or the appointing authority in that behalf may place a Government Servant under suspension, where a disciplinary proceeding aginst him is either contemplated or is pending. It is not in dispute that under Notification issued by the State Government in exercise of the power conferred by R. 11 of the Rules the District Forest Officer was constituted "the appointing authority" in respect of Foresters with effect from 7-5-1962. It is therefore clear that on the date on which the impugned order of suspension was passed on 26-2-1969, the District Forest Officer under whom the respondent was working in the Ghumsur North Division was fully competent to pass the impugned order of suspension. Hence the High Court was perfectly right in rejecting the further contention advanced before it by the respondent herein that the impugned action had been taken in violation of the provisions of Rs. 12.

5. We accordingly allow this appeal-C. A. No. 201 of 1971 set aside the judgment of the High Court and dismiss the Writ Petition in O.J. C. No. 10 of 1970. The parties will bear their respective costs for this Court.

6. In the light of the legal posit-

n enunciated above, it follows that .A. No. 200 of 1971 has also to be lowed. The judgment of the High ourt is accordingly set aside and the rit Petition filed by the respondent therein O.J.C.No. 101 of 1970 will also stand dismissed. The parties will bear their respective costs in this appeal also.

Order accordingly,

* * *

612 .

Report No. 81, P. 04

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

port No. 82, p. 01

Y. V. Chandrachud
Judge
Supreme ourt of India

OBSERVATION

(A) Constitution of India, Art. 311 (2) Second Proviso Cl. (a)–Govt. servant nvicted on criminal charge, released under provisions of Probation of Offenders Act Liability to dismissal under Cl. (a) for Second Proviso to Art. 311 (2)—Does not ase by reason of Sec. 12 of Probation of Offienders Act. Provision (i) Probation of fenders Act (20 of 1958), Section 12—(ii) Dismissal—Public servant—Release after nviction on criminal charge under Probation of Offenders Act.

(B) Constitution of India, Art. 311 (2), Second Proviso, Cl. (a)—Dismissal of vt. servant on conviction of criminal charge—Power as to be exercised fairly, justly d reasonably—Disissal Public servant—Conviction on criminal charge.

OBSERVED BY

Y. V. Chandrachud, D.A. Desai and
Amarendra Nath Sen,
Hon'ble Chief Justice& Judges Supreme Conrt of India.

IN

Civil Appeal No. 480 (N) of 1973, decided on 12-3-1985, betwecn Shankar Dass, pellant v. Union of India and and another, Repondents.

TEXT

Chandrachud, C.J. :—Cases which oke sympathy come frequently before e Court. But pity not often. The case fore us has a unique story to tell the ry of a crime committed under the ess of personal misery compounded the apathy of the Establishment and e appalling delays of law. Ironically e silver lining is furnished by the bra- y of a broken man who has been ghting against injustice for the last 23 ars. When justice is done or so the dges believe the conscience assuaged. t in this case, despite our doing all at can be done for the appellant with- the framework of law we have an easy conscience. Delay not only feats justice and robs it of its immediate relevance to the parties but it shakes the very confidence of the people in the desire and ability of law courts to assist them when they need that assistance most.

2. The appellant was retrenched by the Ministry of Rehabilitation. Government of India in 1960, whereupon he was employed as a Cash Clerk by the Delhi Milk Supply Scheme Department which is under the administrative control of the Government of India. In 1962 he was procesuted for breach of trust in respect of a sum of Rs. 500/-. He repaid amount and pleaded guilty to the charge. Accepting that plea the learned Magistrate, First Class Delhi convicted him under S. 409

of the Penal Code but in view of the peculiar circumstances relating to the crime and the criminal he released him under S. 4 of the Probation of Offenders Act, 1958. As a result of the conviction the appellant was dismissed from service summarily with effect from April 14, 1964.

3. The appellant filed a suit in 1966 in the court of the Sub-Judge, First Class, Delhi for setting aside his dismissal from service mainly on the ground that since he was released under the Probation of Offenders Act, it was not permissible to the authorities to visit him with the penalty of dismissal from service. That suit was dismissed on the ground that since the appellant was convicted of a criminal charge he was liable to be dismissed under Cl. (a) of the second proviso to Art. 311 (2) of the Constitution. The decree of the trial court was confirmed by the learned Additional Senior Sub-Judge' Delhi in January 1968. The appellant filed Second Appeal No. 142 of 1968 in the High Court of Delhi which was allowed by D.K. Kanpur, J, on April 13, 1971. The learned Judge accepted the contention of the appellant that by reason of the provision contained in S. 12 of the Probation of Offenders Act he could not be dismissed from service without affording him a reasonable opportunity of being heard as required by Art. 311 (2) of the Constitution. The Government of India filed a Latters Patent Appeal against that judgment, which was allowed by Jagjit Singh and R.N. Aggarwal, JJ, on October 10, 1972. This appeal of the year 1972 has come up for hearing in this Court more rhan 11 year after it was filed.

4. Section 12 of the Probation of Offenders Act must be placed out of way first. It provides that notwithstanding anything contained in any other law a person found guilty of an offence and dealt with under the provisions of S.3 or 4 "shall not suffer disqualification" attaching to a conviction for an offence under such law. The order of dismissal from service consequent upon a conviction is not a "disqualification" within the meaning of S. 12. There are statutes which provide that persons who are convicted for certain offence shall incur certain disqualifications. For example, Chapter III of the Representation of the People Act, 1951 entitled "Disqualifications for membership of Parliament and State Legislatures" and Chapter IV entitled Disqualifications for Voting" contain provisions which disqualify persons convicted of certain charges from being members of legislatures or from voting at elections to legislatures. That is the sense in which the word "disqualification" is used in S. 12 of the Probation of Offenders Act. Therefore it is not possible to accept the reasoning of the learned single Judge of the Delhi High Court.

5. But though this is so the ultimate order passed by the learned single Judge has to be upheld. It can be supported on grounds other than the one on which it rests.

6. The learned Magistrate, Fist Class, Delhi, Shri Ambar Prakash, was

'ted with more than ordinary under-
anding of law. Indeed, he set an exam-
e worthy of emulation. Out of the
tal sum of Rs. 1,607.99 which was ent-
sted to the appellant as a Cash Clerk,
deposited Rs. 1,107,99 only in the
entral Cash Section of the Delhi Milk
heme. Undoubtedly he was guilty of
iminal breach of trust and the learned
agistrate had no option but to convict
m for that offence. But it is to be ad-
red that as long back as in 1963 when
235 of the Code of Criminal Proced-
r was not on the Statute Book and
er refinements in the norms of senten-
ng were not even in embryo the learn-
Magistrate gave close and anxious
ention to the sentence which in the
rcumstances of the case could be pas-
d on the appellant. He says in his
dgment The appellant was a
ctim of adverse circumstances :
s son died in February 1962, which
as followed by another misfortune :
s wife fell down from an upper
orey and was seriously injured : it was
en the turn of his daughter who fell
riously ill and that illness lasted for
ght months. The learned Magistrate
ncluded his judgment thus :—

"Misfortune dodged the accused for
out a year..............and it seems that
was under the force of adverse circu-
stances that he held back the money
question. Shankar Dass is a middle
ed man and it is obvious that it was
der compelling circumstances that he
uld not deposit the money in question
time. He is not a previous convict.
aving regard to the circumstances of
the case, I am of the opinion that he should be dealt with under the Probation of Offenders Act, 1958."

7. It is to be lamented that despite these observations of the learned Magistrate the Government chose to dismiss the appellant in a huff without applying its mind to the penalty which could appropriately be imposed upon him in so far as his service career was concerned. Clause (a) of the second proviso to Article 311 (2)of the Constitution confers on the Government the power to dismiss a person from service "on the ground of conduct which has led to his conviction on a criminal charge". But that power like every other power has to be exercised fairly, justly and reasonably. Surely, the Constitution does not contemplate that a Government servant who is convicted for parking his scooter in a no-parking area should be dismissed from service. He may perhaps not be etnitled to be heard on the question of penalty since Cl. (a) of the second proviso to Art. 311 (2) makes the provisions of that article inapplicable when a penalty is to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly. Considering the facts of this case, there can be no two opinions that the penalty of dismissal from service imposed upon the appellant is whimsical.

8. Accordingly we allow this appeal set aside the judgment of the Delhi High Court dated October 10, 1972 and direct that the appellant shall be reinsta-

ted in service forthwith with full back wages from the date of his dismissal until re-instatement. The Government of India will pay to the appellant the costs of the suit, the First Appeal, the Second Appeal the Letters Patent Appeal and of this appeal which we quantify at Rupees five thousand. The appellant will report for duty punctually at this former place of work on April 1, 1985.

9. In this brief judgment we have referred to many unhappy facts. We must mention one more. We had adjourned this appeal after hearing it a while in order to enable the Government to consider whether the appellant could be reinstated in service with a reasonable adjustment in the payment of back wages. The learned counsel appearing on behalf the Union of India showed us a letter written by a Deputy Secretary stating that the Hon'ble Minister of Agriculture desired him to say that the Court should decide the case on merits. We have done our modest best in that regard.

Appeal allowed.

R. N. Misra
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Arts. 309, 311, 32 and 16—Central Secretariat Service ules (1962), Rr. 13, 18 – Determination of seniority of Assistants – Select list for rade of Section Officers—Substantial compliance in implementing scheme under ules—Court cannot interfere.

OBSERVED BY

P. N. Bhagwati, Amarendra Nath
Sen and Ranganath Misra

Hon'ble Judges Supreme Court of India.

IN

Writ Petns. Nos. 9323 to 9333 of 1982, and 4830 of 1983, decided on 12-3-985, between Karam Pal, etc. Petitioners v. Union of India and others, Respon-ents.

And

Ram Sarup Kanwar, Petitioner v. Union of India, Respondents.

TEXT

Ranganath Misra, J. :— These 12 pplications under Art. 32 of the Con-itution are by Assistants covered by e Central Secretariat Service Rules, 962 ('Rules' for short), and challenge to the select list for the grade of Sect-n Officers for the years 1978, 1979 and 980 and the common seniority list dt. pril 26, 1979, as also the provisional pplementary list of Assistants dated ugust 21, 1980. They have further pra-ed that the select list and seniority list e re-published on the basis of length of ontinuous service in the grade of Assi-ants and promotion to the grade of ection Officers be granted from the ates when Assistants junior to them ere promoted as Section Officers.

2 The Rules framed under the proviso to Art. 309 of the Constitution came into force from October 1, 1962. Under the Rules, the Central Secretariat Service was constituted and as per rule 3 there are four grades in the Service classified as follows :

(i) Selection Grade (Deputy Secretary to the Government of India or equivalent);
(ii) Grade I (Under Secretary to the Government of India or equivalent);
(iii) Section Officers;
(iv) Assistants.

The first two grades are classified as Central Civil Service, Grade 'A' while the other two are known as the Central Civil Service, Grade 'B' Ministerial. Posts in the first three grades are non-gazetted. The Rules contemplate that there shall be separate cadres in respect of Section Officers' grade and the Assistants' grade and these shall be constituted for each Ministry or office specified in col. 2 of the First Schedule. Under rule 4, a single point gradation list in respect of officers of the Selection Grade and Grade I for all the Ministries or offices specified in col. 2 and for the offices specified against such Ministries or offices in col. 3 of the Schedule is to be maintained. The Rules contemplate direct recruitment as also promotion in respect of certain grades.

3. According to the petitioners the quota rule had broken down as direct recruitment had not been made in many years and on account of such failure, fixation of seniority with reference to the rotational method was not available to be followed. The petitioners also contented that select lists as contemplated by the Rules had not been framed for quite a long period and in the absence of such a select list framed in time, select lists of 1978, 1979 and 1980 prepared without following the criterion of length of service of officers in the grade of Assistants was not only unfair and arbitrary but worked out prejudicially to the petitioners. The main grievance of the petitioners in short is that the scheme for fixation of seniority and consequently the provisions relating to promotion having not been worked out as contemplated, the manner of determination of seniority should be usual rule of total length of service and action taken otherwise should be struck down and seniority should be directed to be re-determined on the basis of length of service only.

4. Repondent No. 1, Union of India, has challenged these allegations by contending that the manner of fixation of seniority is covered by statutory rules and the petitioners are, therefore, not entitled to claim determination of seniority on the basis of length of service; the plea of the petitioners that there had been no direct recruitment for several years is denied and it has been pleaded that direct recruits have come into the service in all years except only two, viz., 1966 and 1970, the quota rule has therefore, really not broken down as pleaded by the petitioners and the rules having contemplated a scheme of direct recruitment and promotion, quota and rota have to work together. Therefore, fixing seniority with referencc to the rational methed was not open to challenge. The Rules have been in force for well over two decades. Great care has been taken in making provision in the Rules to safeguard the interests of the different groups and greater care has also been taken by the Department of Personnel in the Ministry of Home Affairs to give effect to the Rules. Since the officers are drawn from different Ministries for promotion and working out the scheme involves a somewhat complicated process, as long as the policy under the Rules has been given effect to, the working should not be allowed to be attacked merely on account of a casual failure to work up to mathematical precision.

5. Before we start examining the rrectness of the rival contentions advced on either side, it is appropriate at a detailed reference to the Rules is ade in order to ascertain the scheme.

6. 'Cadre' has been defined in Ru- 2, sub-rule (2) to mean the group of sts in the grades of Section Officer d Assistant in any of the Ministries offices specified in col. 2 of the First hedule and any of the offices specified ainst such Ministry or office in Col. 3 that Schedule. 'Cadre Officer' in Rule g) in relation to the Section Officers' ade or the Assistants' grade means a ember of the service of the Section Offrs' grade or Assistants' grade, as the e may be, and includes a temporary icer approved for long term appointnt to that grade. 'Long term appoinent' means under Rule 2(1) appointnt for an indefinite period as different om a purely temporary or ad hoc apptment. 'Common Seniority List' s been defined in Rule 2 (hh) in relan to any grade to mean the seniority t of officers in that grade serving in the cadres specified in the First Schele as on the appointed day and revis from time to time in accordance with e regulations to be framed in that belf by the Central Government. 'Protioner' has been defined in Cl. (o) Ru- 2 to mean a direct recruit appointed a grade on probation in or against a bstantive vacancy, and 'select list' unr Rule 2 (q) is defined to mean the lect list prepared in accordance with e regulations made under Rule 12) or under the regulations contained in the Fourth Schedule. Rule 8 contemplates the intial constitution of each cadre and provides that the permanent and temporary officers of the Section Officers' grade and the Assistants' grade in each cadre on the appointed day shall be determined by the Central Government in the Department of Personnel & Administrative Reforms in the Ministry of Home Affairs.

7. Rule 12 makes provision for recruitment to selection grade I. We are not concerned with this rule in the present case as the dispute is raised by Assistant and the promotional rank to which claim has been laid is that of Section Officer. For them Rule 13 is the relevant rule Sub-rules (1) to (5) relate Section Officers which remaining subrules (6) to (10) relate to Assistants At the time when the Service was constituted sub-Rule (1) reads thus :

"Subject to the provisions of subr. (3), for a period of five years from the appointed day, 1/4 of the substantive vacancies in the Section Officers' grade in any cadre and thereafter, 1/3 of the substantive vacancies in that grade, shall be filled by direct recruitment on the results of competitive examinations held by the Commission for this purpose from time to time.............

Sub rule (1) of Rule 13 as it now stands reads thus :

"1/6 of the substantive vacancies in the Section Officers' grade in any cadre shall be filled up by direct recruitment on the result of the competitive examinations held by the Commission for this purpose from time to time. The remaining vacancies shall be filled by the substantive appointment of persons included in the select list for the Section Officers, grade in that cadre. Such appointments shall be made in the order of seniority in the select list except when for reasons to be recorded in writing, a person is not considered fit for such appointment in his turn." It is thus clear that the proportion of direct recruits has been reduced from the initial 1/4th or 1/3rd to the present 1/6th.

8. Sub-rule (2) of Rule 13 prescribes : Temporary vacancies in the Section Officers' grade in any cadre shall be filled by the appointment of persons included or approved for inclusion in the select list for the Section Officers' grade in that cadre. Any vacancies remaining thereafter shall be filled in equal proportion from among the (a) officers of Assistants' grade who have rendered not less than 8 years' approved service in the grade and are within the range of seniority on the basis of seniority subject to the rejection of the unfiit.........and (b) officers of the Assistants' grade in that cadre with the longest period of continuous service in that grade on the basis of length of service subject to the rejection of the unfit." Sub-rule (5) prescribes the preparation of a select list of Assistant for promotion to the Section Officers' and the manner of preparing and revising the select list has been set out in the Fourth Schedule.

9. Sub-rule (6) prescribes that 50% of the vacancies in the Assistants' grade in any cadre is to be filled by direct recruitment on the results of the competitive examinations to be conducted by the Commission from time to time and the remaining vacancies are to be filled by substantive appointment of persons included in the select list for the Assistants, grade in that cadre. Such appointments are to be made in the order of seniority in the select list except when for reasons to be recorded in writing, a person is not considered fit for appointment in his turn. When difficulties were added to sub-rule (6), one with effect from December 15, 1979. These were to the following effect.

"Provided further that substantive vacancies in any cadre reserved for direct recruitment on the appointed day against which no direct recruits have been appointed may be filled by substantive appointments made after the date of commencement of the Central Secretariat Service (Third Amendment) Rules, 1979 of persons included in the Select List for the Assistants' grade in that Cadre.

Provided also that if sufficient number of candidates are not available for filling up the vacancies in a cadre any year by direct recruitment as aforesaid, the unfilled vacancies in the direct recruitment quota in that cadre shall e filled up by the substantive appointent of persons included in the Select ist for the Assistants' grade in that adre."

10. Sub-rule (6) (a) which was nserted along with the latter proiso authorised: "Notwithstanding anyhing contained in sub rule (6), the ubstantive vacancies reserved for direct ecruitment as on 30th June 1979 on ach cadre against which no direct ecruits have been appointed till that ate plus 50% of the number of such ubstantive vacancies in the cadre may e filled by substantive appointments ade after the date of commencement f Central Secretariat Service (Third mendment) Rules, 1979, of persons ncluded in the select list for the Assisants' grade in that cadre." Under Rule 5 every direct recruit to the grade of ssistant is initially to be appointed on robation for the period of two years rom the date of appointment and every erson other than a direct recruit when e is appointed would be on trial for a eriod of two years also. Rule 16 makes rovision for confirmation of probaioners subject to passing of prescribed ests and satisfactory completion of robation.

11. Rule 18 prescribes seniority n the different grades as on the appoined day. Sub-rule (1) indicates that elative seniority shall be as already etermined on that day and if there had een on such determination the same as to be determined by the department f Personnel & Administrative Reforms, Sub-rule (2) provides that all permanent officers included in the initial constitution of a grade shall rank senior to all persons substantively appointed to that grade after the appointed day and all temporary officers included in the initial constitution of a grade under Rule 8 shall rank senior to all temporary officers appointed to that grade after the appointed day. Rule 18, sub-rule (3) makes provision for the rule in the matter of fixation of inter se seniority for the Assistants' grade. Direct recruits are to rank inter se in the order of merit in which they are placed in the competitive examination on the result of which recruitment is effected. Recruits of an earlier examination are to rank senior to those of a latter examination. Persons appointed substantively to the grade from the select list for that grade shall rank inter se according to the order in which they are so appointed and the inter seniority between direct recruits and persons substantively appointed to the grade for that grade shall be regulated in accordance with the provision made in the fourth Schedule.

12. Regulation 3 in the Fourth Schedule deals with seniority. Clause 3 of this regulation provides ,

"Direct recruits to a Grade and persons substantively appointed to the Grade from the Select List for the Grade shall be assigned seniority inter se according to the quotas of substantive vacancies in the Grade reserved for direct recruitment and the appointment of persons included in the Select

List, respectively". From December 1977, contemporaneously with the insertion of the second proviso to Rule 13 (6) of the Rules, the following was added as a proviso to Cl. 3 of Regulation 3 :

> "Provided that persons appointed substantively in accordance with the provisions of sub-rule (6) of Rule 13 to the Grade from the Select List in any cadre in any year, against direct recruitment vacancies for which direct recruits are not available shall be placed en block below the last direct recruit appointed in that year irrespective of the quotas reserved for direct recruits and persons included in the Select List."

13. In course of the hearing counsel for the petitioner referred to instances where a direct recruit coming into the cadre several years after others coming into the cadre from the Select List had been assigned seniority over such promotees. This was explained by counsel for the respondents to have been the out come of giving effect to Cl. 3 of Regulation 3 as it stood prior to December 1977 without the proviso. The instances relied upon were found to be events prior to the introduction of the proviso. In the absence of challenge to the Rules and the Regulation, resultant situations flowing from compliance of the same are not open to attack. Occasion for similar grievance would not arise in future as the proviso in the relevant regulation and Cls. (4) and (5) of the Regulation 3 will now meet the situation.

14. Neither in the writ petitions nor in arguments before us any challenge was advanced against the vires of the Rules. One of the known patterns of constituting public service, particularly in the executive side, is to draw officers both by promotion as also by direct recruitment. The proportion is fixed depending upon the nature of the service, the availability of suitable manpower and other relevant considerations. The petitioners have, therefore, rightly not challenged before us the scheme under which a moiety of the substantive vacancies in the Assistants' grade is to be filled by direct recruitment and the other by promotion through select lists.

15. The Rules have held the field for 22 years now. During this period direct recruitment had not been made only in two years being 1966 and 1970. Though in the writ petition a general stand had been adopted that direct recruitment had not been made in several years, after the counter-affidavit was filed and it was emphatically asserted that excepting in these two years direct recruitment had been made in other, years, there has been no challenge to that assertion. We agree with the contention that quota and rota have got to go hand in hand and if the quota is not properly adhered to the rota system must fail. In fact, the scheme is such that it can operate in an appropriate way only when recruitment is effected through both the processes as envisaged.

16. As we have already pointed
, difficulty was experienced in
rking out the process when the
ota fixed by the Rules had not been
nered to for one reason or the other
l vacancies were being carried
ward for being filled up in future
rs. This situation necessiated
ertion of the first proviso to sub rule
of Rule 13 in August 1970 and the
er proviso in 1977 as also sub-rule
(a) in 1979. The grievance voiced
these writ petitions obviously
ates to a period prior to the modific-
on of the scheme,

17. The petitioners had, inter
, prayed for the relief of striking
vn the select lists and for direction
t the select lists be reframed on the
is of the length of continuous
vice in the grade of Assistants In
v of what we have said regarding
claim of seniority on the basis of
gth of continuous service, it is not
ll necessary to examine the validity
that contention and give any direc-
n regarding the select lists, particula-
because the claim relating to
onsideration of select lists was
unded upon length of continuous
ice. Nothing was also shown in
rse of arguments as to why the
ct lists were bad. In fact, unless the
es and Regulations are successfully
iled, the select lists are not at all
putable.

18. The field which these Rules
er is indeed very wide one. Assis-
s in all the Ministries or offices
specified in the First Schedule are covered by the Rules. With a view to maintaining the efficiency of the service and at the same time to meet the requirements and exigencies of the service, separate cadres have been formed in respect of Assistants and Section Officers in the different Ministries and offices attached to such Ministries. Notwithstanding the fact that these cadres are different, the scheme makes provision for promotional avenue taking all of them into consideration. Obviously, working it out keeping in view the interests of so many employees in the different cadres is indeed a very onerous and difficult task. This has, there fore, been assigned to the Department of Personnel. Unless there is any serious failure in implementing the Rules and grave injustice is done to some individuals or a group of officers, we do not think it would be proper to interfere with the working of the scheme and dislocate the inter se seniority of the officers in these grades. No malafides has been pleaded nor has any grave injustice been established in the writ petitions. At the most a case of improper working of the scheme with reference to some of the officers has been alleged. Hairsplitting arguments, if accepted, might indicate that some of the petitioners have not been promoted to the grade of Section Officers as and when due. We are of the view that if there has been substantial compliance in implementing the scheme under the Rules, judicial interference is not called for. In a vast country

such as ours, a strong and independent bureaucratic set up is indispensable At the same time it is equally necessary that the service from top to bottom must be alive to the fact that it is its obligation to maintain prope attitudes discipline and duty-oriented working. While it is the right of every person in the Service set-up to expect just and fair treatment in regard to his employment frequent litigation between him and the State involving countless other co-employees in the Service in the battle is a deviation from the right direction. It is true that very often instances come to light where the grievance is genuine and the treatment meted is unwarranted and uncalled for. Government in a democratic polity runs on impersonal basis but on the cardinal code that every one shall perform his duty. We may recall what this Court observed in Dr. G Marulasiddaiah v. Dr T. G. Siddapparadhya, (1971) 1 SCC. 568 :

> "The canker of litigiousness has spread even to a sphere of life where discipline should check ambition concerning personal preferment A teacher is justified in taking legal action when he feels that a stigma or punishment is undeserved but he is expected to bear with fortitude and reconcile himself to his lot suppressing disappointment when he finds a co-worker raised to a position which he himself aspired after."

19 There has been a phenomental rise in service disputes in the last three decades. It is time that serious attention is bevoted to discover the reason for it and take effective steps to ensure curtailment thereof. Whether such litigations come before courts or tribunals is of no consequence here. Frequent litigations between the State and its employees ultimately affect the efficiency of the service and bring about indiscipline, lack of loyalty and an attitude of indifference.

20. In the course of arguments reference was made to certain decisions of this Court. In N. K. Chauhan v. State of Gujarat, (1977) 1 SCR 1037 : (AIR 1977 SC 251), this Court held that the quota system does not necessitate the adoption of the rotational rule in practical application and many ways of working out quota prescribed can be devised of which rota is certainly one. It was further held that while laying down a quota when filling up vacancies in a cadre from than one source, it is open to Government, subject to tests under Art. 16, to choose 'a year' or other period of vacancy by vacancy basis, to work out the Quota among the sources But once the Court is satisfied, examining the constitutionality of the method proposed, that there is no invalidity administrative technology may have free play in choosing one or the other of the familiar processes of implementing the quota rule. This Court did indicate that as Judges we cannot strike down a particular scheme because it is unpalatable to forensic taste. This Court further pointed out that ordinarily seniority is measured by length of continuous officiating service. This, however, does

t preclude a different prescription, nstitutionality tests being satisfied. hen the Court found that promotees d been appointed in excess of their ota, the following direction was ven :

"Promotees who have been fitted to vacancies beyond their quota durg the period B– the year being regard as the unit must suffer survival as valid appointees acquiring new life ien vacancies in their quota fall to be ed up. To that extent they will step wn, rather be pushed down as against rect recruits who were late but regully appointed within their quota".

The rationale of this decision is ined very much against the contentions the petitioners.

21. Reference was also made to case of S.B. Patwardhan v. State of aharshtra, (1977) 3 SCR 775. The pute that fell for adjudication in that e was one of seniority in the cadre Deputy Engineers and grievance had en laid that notwithstanding the len of continuous service, later appoins had been shown as senior. Attent in the decision as mainly confined the terms of the provisions of the les applicable to the State Engineer Service. In the view we have taken the matter this decision indeed does t help the petitioners

22. Next is the case of Baleshwar ss v. State of U.P., (1981) 1 SCR 449 IR 1981 SC 41). This Court pointed that for the purposes of seniority apintment to the service in a substantive pacity was necessary. But that again was said with reference to R. 23 of the U. P. Service of Engineers (Junior and Senior Scales—Irrigation Branch) Rules.

23. This Court in V. T. Khandoze v. Reserve Bank of India, (1982) 3 SCR 411, took note of the fact that "no scheme governing service matter can be foolproof and some section or the other of employees is bound to feel aggrieved on the score of its expectation being falsified or remaining to be fulfilled. Arbitrariness, irrationality, perversity, and mala fides will of course render any scheme unconstitutional but the fact that the scheme does not satisfy the expectations of every employee is not evidence of these."

24. Next is the case of A. Janardhana v. Union of India, (1983) 2 SCR 936. That was a case relating to dispute of inter se seniority of direct recruits and promotees in the Military Engineering Service. Seniority lists drawn up earlier on the basis of length of service including continuons officiation were subsequently altered to lists bassed on quota between direct recruits and promotees leading to rotate for confirmation and this led to the dispute. The Court found that some of the officers had been promoted prior to the enforcement of the Rules in 1969. The Rules had no retrospective effect and, therefore,'seniority lists' drawn up prior to the enforcement of the Rules were not open to be revised and re-drawn up after the Rules became operative. The Court further found that the quota rule had not been worked out and if rotat-

R. N. Misra
Judge
Supereme Court of Ind

ional confirmation was to be done, may of the employees considered hitherto senior would be very badly affected. Here again we must point out that this decision has no application to the facts before us since on the finding reached by us the quota rule was substantial complied with.

25. The writ petitions must acco dingly fail. We make no order f costs.

Petitions dismisse

R. N. Misra
Judge
Supreme Court of India

OBSERVATION

(A) **Constitution of India,** Arts. **14, 16**—**Central Secretariat Service Rules** **62), Sch. 4, Regn.** 3 (3)—**Inter** se **seniority**—**Fixation**—**Regulation held, not ultra-** **s of Arts.** **14 and 7 (Seniority**—**Fixation of).**

(B) **Constitution of India,** Arts **14, 16**—**Central Secretariat Service Rules** **52), R.** 12 (5), Note No. 2—**Provisions under**—Not violative of Arts. 14 **and 16-** **niority—Fixation—Length of servisce).**

OBERVED BY

P.N. Bhagwati, Amarendra Nath Sen
and Ranganath Misra
Hon'ble Judges, Supreme Court of India

IN

Writ Petns, Nos. 10618-10628 of 1983 decided on 12-3-1985, between H.V. Par- ani, etc. Petitioners v. Union of India and others, Respondents.

TEXT

Ranganath Misra, J.:—Petitioners hese applications under Art. 32 of Constitution belong to the cadre of tion Officers in the Central Secreta- Service (Service' for short). They llenge the combined seniosity list of the Section Officers belonging to the ice and have asked for a direction t the select list in Grade I of the Ser- be recast They have also asked a further direction that some of the ct recruits included in the eligibility of Section Officers shown in Annex- Pl should be omitted from it and a ction should issue from the Court ppoint promotees to Grade I with ct from the date on which junior ectly recruited Section Officers have n appointed to Grade I. They have her assailed the vires of the note below Rule 12. R. 13(5) and Regulation 3 (3) of the Fourth Schedule as being ultra vires Articles 14 and 16 of the Constitution. According to the petitioners the seniority between the direct recruits and promotees in the Grade of Section Officers has to be fixed on the basis of length of service in the grade and not by the process envisaged under the Rule and the relevant Regulations.

2. The respondents have taken the stand that the provision for fixing seniority has been made by the statutory Rules and the combined seniority list as also the eligibility list are in accordance with the statutory scheme.

3. These applications were heard along with a batch of other writ petitions filed by Assistants belonging to the Service the judgment whereof is being sim-

ultaneously delivered.

4. It is appropriate that we refer to the provisions of the relevant Rules and Regulations before we proceed to examine the submissions. The composition of the Service is covered by Rule 3 which provides for four grades being:-

(i) Selection Grade (Deputy Secretary to the Government of India or equivalent) :

(ii) Grade I (Under-Secretary to the Government of India or equivalent):

(iii) Section Officers' Grade :

(iv) Assistants' grade.

The first two grades have been combinedly classified as Central Civil Service Grade 'A' while the other two have similarly been classified together as Central Civil Service Group 'B'—Ministerial. In this bunch of writ applications we are concerned with the claim of Section Officers belonging to the third grade in the classification seeking promotion to Grade I which is covered by the second Grade. Rule 12 makes provision for recruitment to the Selection Grade as also Grade I. Sub-rule (2) thereof provides : "Vacancies I shall be filled by promotion of permanent officers of the Section Officers' Grade who have rendered not less than eight years' approved service in that Grade and of permanent officers of the Grade 'A' of the Central Secretariat Stenographers' Service who have rendered not less than eight years' approved service in that Grade and have worked as Section Officers for at least a period of two years in accordance with the proviso to Rule 10 and are included in the Select List for Grade I of the Service prepared under sub-rule (4)." There are four provisos to this sub rule· The second and third provisos which are relevant are to the following effect :

"Provided further that no person included in a later Select List shall be eligible to be appointed to the Grade until all officers included in an earlier Select List have been appointed.

Provided further that if any person appointed to the Section Officers' grade is considered for promotion to Grade I under this sub-rule, all persons senior to him in Section Officers' Grade who have rendered not less 'than six years' approved service in that Grade, shall also be considered notwithstanding what that they may not have rendered eight years' approved service in that Grade; provided that the aforesaid condition of six years' approved service shall not apply to a person belonging to the Scheduled Castes or the Scheduled Tribes.

Sub-rule (4) provides that for the purposes of sub-rules (1) and (2) a Select List for the Selection Grade and Grade I shall be prepared and may be revised from to time time. In note 2 to sub-rule (5) it has been indicated that "in the case of persons included in the Select List for the Section Officers' Grade 'approved service' for the purpose of this rule shall count from the lst July of the year in which the names of the officers are included in the Select List." In the case of the direct recruits to the Section Officers' Grade, such service shall count from the lst

July of the year following the year of the competitive examination on the results of which they have been recruited provided that where there is a delay of more than three months in the appointment of any candidate such delay is not due to any fault on his part.

5. Since seniority in the cadre of Section Officers is relevant for the disposal of the present applications, we have to refer to the method of recruitment of Section Officers in sub-rule (1) of Rule 13. That sub-rule prescribes :

"One sixth of the substantive vacancies in the Section Officers' Grade in any cadre shall be filled by direct recruitment on the results of the competitive examinations held by the Commission for this purpose from time to time. The remaining vacancies shall be filled by the substantive appointment of persons included in the Select List for the Section Officers' Grade in that cadre..."

Sub-rule (5) of Rule 13 prescribes :

"For the purpose of sub-rules (1) and (2) a Select List for the Section Officers' Grade shall be prepared and may be revised from time to time. The procedure for preparing and revising the Select List shall be as set out in the Fourth Schedule".

Rule 18 (3) (c) dealing with seniority provides :

"The relative seniority of direct recruits to a Grade and persons substantively appointed to the Grade from the Select List for the Grade shall be regulated in accordance with the provisions made in this behalf in the Fourth Schedule.".

Regulation 2 dealing with the maintenance of Select List requires :

"Additions to the Select List for the Section Officers' Grade in any cadre shall be made in such numbers as the cadre authority may determine from time to time keeping in view the existing and anticipated vacancies so as to ensure that one person each by rotation is included from out of the categories of persons specified below........."

Regulation 3 deals with seniority and clause (3) thereof says :

"Direct recruits to a grade and persons substantively appointed to the Grade from the Select List for the Grade shall be assigned seniority inter se according to the quotas of substantive vacancies in the Grade reserved for direct recruitment and the appointment of persons included in the Select List, respectively".

There is no dispute that in the absence of any special provision regulating determination of seniority, length of continuous service in any particular grade would be the basis for determining seniority in that grade. The legal position is equally settled that if a rule prescribes a method of fixation of inter se seniority, the normal practice would not apply and the rule shall prevail, obviously subject to its constitutionality. There is no dispute that under rule 13(1) dealing with recruitment to the grade of Section Officers a quota has been fixed and provision has been made for manning of the cadre both by direct recruitment or also by promotion. At the time when the service was constituted in 1962 the quota of direct recruits had been fixed at 1/-4th, and after five years from the appointed day it was made 1/3rd Later it has been reduced to 1/6th. The manning of the Section Officers' Grade, therefore, has to be by direct recruitment to the extent of 1/6th and by promotion out of the Select List to the extent of the remaining 5/6th.

6. The Select List referred to in sub-rule (1) of rule 13 is drawn up by following the procedure specified in Regulation 2 of the Fourth Schedule which provides that additions to the Select List for the Section Officers' Grade in any cadre shall be made keeping in view the existing and anticipated vacancies so as to ensure that one person each by rotation is included from out of the category of persons, namely (a) of officers of the Assistants' Grade belonging to that cadre who have rendered not less than eight years, approved service in that grade and are within the range of seniority in order of their seniority subject to the rejection of the unfit, the range of seniority being defined in rule 2(oo), and (b) persons selected on the basis of the result of the limited departmental competitive examination held by the commission, from time to time, in the order of their merit.

7. Inter se seniority of direct recruits and promotees in the grade of Section Officers is fixed in accordance with the provisions contained in Regulation 3(3) of the Fourth Schedule. The requirement of the Regulation is that inter seniority of the direct recruits and persons substantively appointed to the grade from the select list should be determined in accordance with the quota on the basis of substantive vacancies in the grade reserved for the two categories of officers.

8. As already indicated, seniority in the cadre of Section Officers is the basis on which selection to the higher grade in respect of promotees has to be made. If the petitioners are not able to establish that the determination of their is seniority is wrong and they have been prejudiced by such adverse determination, their ultimate claim to promotion would indeed not succeed.

9. Promtion to the grade of Under Secretary is made from amogst the members belonging to the grade of Section Officers and rule 12 is the relevant rule. In exercise of powers under rule 12 (4), the Central Government has framed the Central Secretariat Service (Promotion to Grade 1 and Selection Grade) Regulations, 1964. Regulation 5 (2) provides : "Officers" other then those included in clauses (a) and (b) shall be arranged in the manner specified below: (i) The names of officers appointed to the Section Officers' Grade before the appointed day and included in the Select Lists of Section Officers at the initial constitution under paragraph 1 of the Fourth Schedule to the Rules shall be arranged in the order of their seniority as determined before that day. Additions to this list shall be

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le by including officers appointed to Section Officers' Grade after the ointed day through the Select List the Grade, officers appointed on basis of an earlier select list being ced obove those appointed on the s of a later Select list. The order ames shall be in the same order as ll the Secretatiat Select Lists issued the Department of Personnel and ninistrative Reforms" This Select is contemplated to cover the entire etariat and is, therefor required reflect all the select lists the caderes of Section Officers. this single list of eligible Section cers the names of the directly uited Section Officers on the basis e combined competitive examinas and arranged in the order of merit ninations as the scheme vides have to be interpolated rding to the quota of vacancies rved for direct recruits at the time eir recruitment.

10. In our judgment in the connewrit petition Nos. 9323-9333 of 2 delivered today, we have already that the scheme constituting a ice to be manned both by direct uits as also promotees is unexceptible. Prescription of quota becomes essary to work out such scheme and is a well accepted method for ng effect thereto. Seniority based rota, therefore, is also not open ttack.

11. Regulation 3(3) of the Fourth edule provides that inter se seniority irect recruits and promotees shall be according to the quota of substantive vacancies in the grade reserved for direct recruits and promotees respectively. The Rules make detailed provision for giving effect to the quota rule and since officers are drawn from two different sources, provision has also made for fixing their inter se seniority. The scheme does not to be arbitrary and we are, therefore, of the view that the Rules and the Regulations intended to give effect to the scheme are not ultra vires of either Article 14 or 16 of the Constitution. We may reiterate that the petitioners have not questioned the quota rule itself and if they had, for the reasons we have indicated both here and in the judgment of the connected matters, the objection would have been of no avail.

12. Considerable argument was advanced in support of the petitioners' stand that in giving effect to the scheme prejudice has been caused to the petitioners. It is appropriate to take note here of the fact that the inter se seniority of the direct recruits and promotees in each of the cadres af Section Officers has not been challenged before us. Such fixation has been made years back. In the absence of challenge to such fixation, the consequential process of drawing up for select list depending upon such seniority for promotion to Grade I (post of Under Secretary) would not be open to challenge. The scheme contemplates drawing up of a combined list from out of the cadres of Section Officer and to entertain a

challenge at this stage would naturally affect the respective seniority lists in the caders and would involve many officers who have not been made parties to this proceeding. This Court has taken the view in many decided cases that if there is a quota rule to implement, the question of length of services becomes an irrelevant consideration (see Mervyn Coutindo and ors v. Collector of Customs, Bombay and ors. (1963) 3 SCR 600 N. K. Chauhan and ors. v. State of Gujarat and ors. (1971) 1 SCR 1037. and P. S. Mahal and ors. v. Union of India and ors. AIR 1984 SC 1291, A number of decisions were cited on behalf of the petitioners, a reference to all of which we have made in the connected judgment. As pointed out by as therein in both the cases of A. Janardhana 4. (1983) 2 SCR 936. and P S. Mahal this Court proceeded on the footing that there had been a break-down in the enforcement of the quota rule. Once the quota rule fails, the rota can no longer be enforced without causing prejudice to officers with longer periods of service in the cadre. We do not think that the ratio of those cases can be applied in the case before us where there is no material to support the contention that the vacancies have not been filled up by following the prescribed quota.

13. In course of arguments, the petitioners' counsel contended by relying on the feature that a bunch of direct recruits has been placed above a group of promotees by operation of the quota rule and that the fixation of seniority was arbitrary. It was pointed out by the learned Additional Solicitor General appearing for the Union of India and Mr. Shanti Bhushan appearing for other respondents that the submission was misconceived. In this list of eligible officers, names of many who had already retired or had been promoted to other grades not been shown. The working chart placed before us reflected the actual position. On a reference to the chart, we are satisfied that the quota rule has been implemented while drawing up the eligibility list in accordance with Regulation 5(2) (c) (i) and (ii). It was further explained that certain names which were not found in the eligibility list of 1982 appear in the list for the following year on account of the fact that on the completion of six years of service such names have been brought in as those officers be came qualified for inclusion.

14. The next contention raised on behalf of the petitioners was against note No. 2 appearing under rule 12 (5) which is to this effect.

"In case of persons included in the Select List for the Section Officers' Grade 'approved service' for the purpose of this rule shall count from the Ist July af the years in which the names of the officers are included in the Select List in the case of direct recruits to the Section Officers' Grade, such service shall count from the Ist July of the year following the year of the competitive examination on the

R.N Misra
Judge
Suprme Court of India

sults of which they have been rec- ited provided that where there is a lay of more than three months in e appointment of any candidate, such lay is not due to any fault on his art."

is note initially appeared to be mewhat arbitrary but after hearing unsel at length we are inclined to ree with the submission advanced behalf of the Union of India that the process of direct recruitment, ere is considerable delay and though e competitive examination is held one particular year, by the ne the selected officer comes to in the post, more than a year is lost. herefore, a rational view has been ken of the situation and for the com- tation of length of service the partic- ar provision has been made. This in ur view is really not open to challenge an arbitrary provision. We may re- erate that a very intricate process is in- lved in giving effect to the scheme and harmonising the claims of the officers elonging to the different cadres. Math- natical precision cannot be expected in matter like this and adoption of a test f such accuracy with a view to ascert- ning whether Articles 14 and/or 16 of e Constitution are violated would not e appropriate.

15. Challenge to the scheme in ule 18 in the matter or fixation of seni- rity had been advanced in the case of P. C. Sethi v. Union of India, (1975) 3 SCR 201 and was negatived by this Court.

16. Delay and laches were advanced as contentions on behalf of the Central Govt. For rejecting the petitions. We do not think it is necessary to go into that question as we have already taken that into consideration while other with other contentions. It is, however, relevant to point out that of the 11 petitioners as many as 9 had got the cadre of Assistants as direct recruits and they had themselves got advantage over promotees who had put in a longer period of service in such cadre. They should not now grudge a similar advantage being obtained by some other direct recruits in the higher cadre. After all as we have already said, in a case of this type a broad perspective has to be maintained and examination cannot be permitted to be as strict as petitioners have asked us to adopt

17. In view of what we have said each of these petitions must be dismissed but we think it appropriate to suggest to the Central Governmet to streamline by a review of the Rules and Regulations so that the rancour and heartburning in the officers may be reduced to the inevitable minimum in the matter of implementation. Parties are directed to bear their own costs.

Petition dismissed.

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

D. A. Desai
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art. 311 (2)—Order of compulsory retirement passed without following principles of natural justice—No rules fixing age of compulsory retirement—Art 311 (2) is attracted—Enquiry is illegal and vitiated.

Compulsory Retirement—Where there is no rule fixing the age of compulsory retirement or if there is one and the servant is retired before the age prescribed therein, then that can be regarded only as dismissal or removal—An enquiry in accordance with the rules of natural justice would be a pre-requisite before imposing any penalty—Constitution of India, Art. 311 (2).

OBSERVED BY

D. A. Desai; V. Balakrishna Eradi
and V. Khalid,

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 1605 of 1971 decided on 10-4-1985, between Murari Mohan Deb, Appellant v. Secretary to the Govt. of India and others, Respondents.

TEXT

Desai, J. :— Murari Mohan Deb, a Forester in the employment of Tripura Government was compulsorily retired from service by the order dated October 12, 1962 of the 4th respondent Chief Forest Officer. Since than he is knocking at the doors of the courts in search of illusory justice and chased mirage till he reached the age of superannuation. Alas! the ways of justice like the ways of Providence are inscrutable. And who is to blame, if not, the system.

2. The appellant questioned the correctness and validity of the order of compulsory retirement in Writ Petition No. 22 of 1964 which came to be disposed of after a lapse of six years on November 28, 1970. In his writ petition the appellant had impleaded (1) The Secretary to the Government of India, Ministry of Home Affairs, (2) The Chief Commissioner, Tripura, (3) The Secretary to the Government of Tripura, Forest Department and (4) The Chief Forest Officer, Government of Tripura, last one being the one who had passed the impugned order of compulsory retirement. The grievance in the writ petition was that penalty of compulsory retirement was imposed upon the appellant without affording the appellant an adequate opportunity to defend himself and to explain the charges levelled against him. In short it was alleged that the enquiry was held in violation of the prin-

ciples of natural justice.

3. The respondents resisted the writ petition inter alia contending that as the punishment of compulsory retirement does not tantamount to dismissal or removal form service as contemplated by Art. 311 (1) and therefore, no formal enquiry was necessary to be held before imposing the penalty. It was contended that adequate opportunity was afforded to the appellant to controvert the charges and defend himself.

4. Surprinsingly, when the matter was taken up for hearing, the learned Judicial Commissioner suo moto raised the objection that in the absence of Union of India being made a party, the petition was not properly canstituted.

5. After an elaborate discussion, the learned Judicial Commissioner recorded a finding that Government of India was a necessary party and in its absence the petition is incompetent and must be rejected. After having reached this firm conclusion, the learned Judicial Commissioner proceeded to investigate the contention of the appellant that the enquiry against him was held in violation of the principles of natural justice, and that the Chief Forest Officer being not the appointing authority could not impose the penalty of compulsory retirement on the appellant. In respect of the second contention, the learned Judicial Commissioner held that as it has been unquestionably established that the appellant was appointed by the Chief Commissioner the Chief Forest Officer,a subordinate of the Chief Commissioner was not competent to impose the Penalty or compulsory retirement and therefore on merits the order was bad. However, consistent with his view that the writ petition in the absence of Union of Indi was incompetent, he rejected the writ petition. Hence this appeal by special leave.

6. This appeal reached hearing on July 26, 1984 and after hearing Mr. D.N. Mukherjee, learned counsel for the appellant and Mr. Abdul Khader, learned counsel for Tripura Administration, we told them that the appeal is bein allowed and the impugned order is being set aside. However, at this stage, Mr. Abdul Khader, learned counsel for he State of Tripura pointed out that as the appellant even on his showing has reached the age of superannuation, even if the impugned order is illegal and invalid, the relief of reinstatement cannot be granted to him. As the facts were not clear, a direction was given that the matter be listed on August 7, 1984 for clarification about the date of superannuation of the appellant. At the resumed hearing it was conceded that, had the appellant not been compulsorily retired from service, he would have retired on superannuation on December 6, 1978. In this fact situation the relief of physical reinstatement could not be granted. On that day a direction was given that the second respondent should compute and calculate the back-wages payable to the appellant on the footing that the order of compulsory retirement is illegal and invalid and the appellant continued to be in

D. A. Desai
Judge
Supreme Court of India

ervice till December 6, 1978. The natter thereafter was listed on October 17, 1984 when Mr. Abdul Khader, earned counsel for the second respon-lent produced before us the rough com-outation made by the competent autho-ity pursuant to our direction showing hat approximately Rs. 93,000/-would e payable to the appellant as and by vay of back-wages and he would be ntitled the gratuity and pension there-fter. The plight of the appellant lent rgency to the matter inasmuch as the ppellant was without succour for a ong period, a direction was given that he second respondent i. e. Tripura Ad-ninistration should pay Rs. 93,000/-by demand draft drawn in favour of the ppellant within four weeks from the ate of the order. A further direction vas given that year to year calculation f computation of back-wages must be ubmitted to the Court.

7. Kamal Baran Dev son of the ppellant filed an affidavit dated Novem-er 7, 1984 in which he pointed out hat had the appellant continued in ser-ice, if the illegal order of compulsory etirment had not been made, he vould have earned two promotions, amely, as Forest Ranger and Senior orest Ranger, all posts in Class III nd IV grade. According to the appe-ant's computation, his pension be xed at Rs. 550/-p m. According to im, he would be entitled to recover s. 3,25,000/-from the respondents for e period upto and inclusive of July, 984.

8. Shri R.M. Dutta, Deputy Conservator of Forests, Government of Tripura filed a counter-affidavit in which it is pointed out that looking to the age and qualfiications of the appellant, he would not have earned a single promotion. It was pointed out that the post of Forest Ranger and that of Senior Forest Ranger are governed by the recruitment rules which came into force in 1965 which did not envisage automation promotion purely according to seniority. It was also pointed out that seniority is was also pointed out that seniority is only one of the criteria that the Departmental Promotion Committee has to take into consideration while recommending the promotion of a Forester to the post of Forest Ranger. It was further pointed out that the revised pay scale for the post of a Forester was Rs. 260-495/-effective from March 1, 1974 and that the appellant would have retired in that scale. To this affidavit was annexed calculations monthwise and it was pointed out that at best the appellant would be entitled to Rs. 93, 444.08 p. inclusive of pension from 6-22-78 to September 30, 1984, encashment of leave and gratuity.

9. Mr. D.N. Mukherjee, learned counsel for the appellant urged that we should not accept the computation as made by the competent authority as set out in the annexure to the affidavit of Shri R.M. Dutta. To a query of the court as to how the appellant has worked out his arrears of back-wages at Rs. 25,000/-,there was hardly any convincing answer though some rough

and ready calculation was attempted to be offered to us which we find very difficult to implicitly rely upon.

10 Mr. Abdul Khader fairly stated that it is difficult to support the judgment of the learned Judicial Commissioner that in the absence of Union of India being impleaded as a party, the petition as constituted was incompetent. We have not been able to appreciate why the learned Judicial Commissioner should have taken upon himself to raise this untenable contention even though the respondents did not raise such a contention. Respondent No. 1 is shown to be the Secretary to the Government of India, Ministry of Home Affairs. If there was technical error in the draftsmanship of the petition by a lawyer, a Forester a class IV low grade servant should not have been made to suffer. An oral request to correct the description of the First resdonpent would have satisfied the procedural requirement. By raising and accepting such a contention, after a lapse of six years, the law is brought into ridicule. The court could have conveniently read the cause title as Government of India which means Union of India through the Secretary, Ministry of Home Affaies instead of the description set out in the writ petition and this very petition would be competent by any standard. The contention is all the more objectionable for the additional reason that the appointing authority of the appellant, the Chief Commissioner of the Government of Tripura as well the Chief Forest Officer who passed th impugned order were impleaded an they represented the administration o Tripura Government as well as th concerned officers. Therefore, not onl the petition as drawn up was competen but not bone of contention could h taken about its incompetence. Mr Abdul Khader, learned counsel for th Government of Tripura rightly did no press this point.

11. The learned Judicial Commissioner rightly held that the impugned order of compulsory retirement was imposed by an authority not competent to impose the same and therefore it is ab initio illegal and invalid. Further, it appears crystal clear from the record that in this case when the appellant was only 42 years of age, compulsory retirement was imposed as a penalty for misconduct. We are not unaware of the legal position that where relevant service rules provide for an age of superannuation and permits compulsory retirement in public interest on reaching a certain age lower than the age of superannuation, an order of compulsory retirement according to relevant service rules cannot be styled as imposing a penalty and obviously Art. 311 (2) will not be attracted. As held by this Court in Shyam Lal v. State of U. P. (1955) 1 SCR 26 : an order of compulsory retirement differs both from an order of dismissal and an order of removal from service in that it is not a form of punishment prescribed by the rules, and involves no penal conse-

qnences, inasmuch as the person who retires is entitled to pension proportionate to the period of service standing to his credit. See State of Bombay v. Saubhagchand M. Doshi 1958 SCR 571. It thus appears that where the relevant service rules fixed both an age of superannuation and an age of compulsory retirement and the services of a Government servant governed by the rules are terminated between these two points of time, the order of compulsory retirement could not be said to cast a stigma and would not attract Art. 311. But where there is no rule fixing the age of compulsory retirement or if there is one and the servant is retired before the age prescribed therein, then that can be regarded only as dismissal or removal within Art. 311 (2). See Saubhagchand Doshi's case at 579 (of SCR). In this case it is admitted that the relevant service rules prescribed an age of superannuation. It was not pointed out that the relevant rules fixed some other age beyond which and before reaching the age of superannuation, a Government servant can be compulsorily retired in public interest. Nor it is claimed that the order of compulsory retirement in this case was made under the relevant service rules in public interest. It would have been atrocious to contend to that effect in respect of a Forester, a low grade class IV servant who would be required to be compulsorily retired in public interest. But if there was such a rule we would have positively examined the same. At any rate, it is crystal clear that the appellant was aged only 42 when the order of compulsory retirement was made. It was not sought to be supported on the ground that the appellant leaving put in service for a certain number of years, he could have been compulsorily retired. On the contrary, it is admitted that the order of compulsory retirement was by way of penalty imposed upon him for misconduct after an enquiry. Obviously therefore, Art. 311(2) will be attracted and an enquiry in accordance with the rules of natural justice would be a pre-requisite before imposing any penalty. It would be presently pointed out that the enquiry was sham and held in violation of principles of natural justice.

12. The enquiry officer issued a notice that the enquiry against the appellant would be held at Rangamura but at short notice subsequently, the venue was suddenly shifted to Radhnagar where the appellant could not keep his witnesses present. He did not have an opportunity of examining the records used against him. Therefore, for more than one reason, the enquiry appears to have been held in violation of principles of natural justice and is vitiated. It the enquiry was illegal, any punishment imposed as a result of the enquiry must fail. Therefore, the order of compulsory retirement is bad for more than one reason and liable to be set aside and is hereby set aside.

13. Once the order of compulsory retirement is set aside, the appellant continues to be in service. He has reached the age of superannuation as on December 6, 1978 as pointed out in the

affidavit and not controverted. There fore, it is not permissible to direct his reinstatement in service. He would be entitled to back-wages from the date of compulsory retirement on October 16, 1962 till the date of his superannuation on December 6, 1978.

14. Before we determine the amount payable as back-wages, we must make it distinctly clear that while computing the amount we have kept in view the meagre monthly salary which the appellant would have received for the years 1974 when the pay scale of his post was revised. In any year if he had received full salary, he was not liable to pay Income-tax at the rates then in force. Even the revised salary with the exemption limit of income-tax going up would have not been assessable to income-tax. And this lowest grade Class IV servant, we were informed had no other source of income. Now that the amount is payable in the lump sum, presumably the Government may resort to Sec. 192 of the Income tax Act. But let it be made distinctly clear that the appellant is entitled to the benefit of Sec. 89 and Rule 21A of the Income Tax Rules and he is entitled to relief under Sec. 89. Therefore, while computing the total amount, we have kept the spread-over in view and in no year any income-tax is deductible from the meagre salary of this low paid IV employee. If therefore, any deduction is made towards income-tax while making the payment, it is incumbent upon the Tripura administration to take all necessary steps to obtain the relief for the appellant under Sec. 89 of the Income-tax Act read with Rule 21A of the Income Tax Rules.

15. As pointed out earlier, rival contentions and calcutations have been examined by us and keeping them in view and having regard to the circumstances of the case, we direct that over and above the amount of Rs. 93,000/- already paid to the appellant, he should be paid Rs. 7,000/- more towards back wages and pension upto and inclusive of December 31, 1984. The respondent shall pay pension at the rate of Rs 400/- from January 1, 1984. The appellant shall also be paid dearness allowance if admissible to pensioners getting pension at Rs. 400/- p. m. The appellant shall also be paid gratuity at the admissible rate treating him in service upto and inclusive of December 6, 1978. The payment herein directed shall be made within a period of eight weeks from today. The respondent shall also pay costs to the appellant quantified at Rs. 2,000/-. Appeal is allowed to the extent herein indicate.

Appeal allowed.

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port No. 86, p. 01

R. N. Misra
Judge
Supreme Court of India

OBSERVATION

(A) Constitution of India, Arts. 16, 14, 226—Appointment—Regularization of—ainee Engineers of State Electricity Board continued as such since long—Board ating them as specific class—Equitable doctrine—Applicability of Board was bou- to regularise appointments—Mandamus issued accordingly. (1984) 1 Serv. LR 3 (Pat), Reversed (i) Master and servant—Appointment, regularisation of; (ii) ster and servant—Equitable doctrine, applicability of)

(B) Constitution of India, Art 12—"State"—Bihar State Electricity Board is a tutory authority—Hence, it is a "State" within Art 12. (State—Meaning of).

OBSERVED BY

S. Murtaza Fazal Ali
A. Varadarajan and
Ranganath Misra,
Hon'ble Judges Supreme Court of India.

IN

Civil Appeals Nos. 268 and 269-273 of 1984, decided on 8-5-1985, between ya Narain Yadav and others, Appellants v. Bihar State Electricity Board and ers, Respondents.

TEXT

Ranganath Misra, J. :—These appe- are by special leve and two of these by Junior Engineers while the er four are by Assistant Engineers rking under the respondent Bihar te Electricity Board. In Sept. 1975, Board advertised in local newspa- s that selection of Electrical Engine- would be made under an "Employm- Promotion Programme" and Engine- with 50 percent marks in the degree amination would be eligible for consi- ration. In due course, such selection s made and a group of Apprentice gineers also called Trainee Engineers me to serve under the Board. These selected engineers had already completed their training for the purpose of obtaining the degree in engineering. The graduate trainees were called upon to report for a period of six months' training with effect from April 1,1977. In March 1977, the Board had indicated that the training does not guarantee employment under the Board but in Aug. 1977, the Board resolved that 200 vacant posts of Junior Engineers would be filled on the basis of chain system and the existing trainees would be continued as trainees on existing stipends. As time elapsed and no appointments were made as represented by the Board, representation was made by some of the trainee engineers pointing out that unless the Board's decision of Sept. 1977, was implemented without loss of time, some of them would become over-aged for appointment under Government. Soon after the said representation, the Board extended deputation of the trainee engineers and indicated that the deputation to Thermal Power Stations under the Board would be of permanent nature. The Board published a notice on March 13, 1979, to the effect that a decision regarding regular employment of degree and diploma trainee engineers of the Board for the post of Assistant Electrical Engineers and Junior Electrical Engineers has been taken by the State Government and on completion of their training in Oct. 1979, regular appointment would be made. It was further pointed out there in that those trainees who had left training should join at the places of their respective posting latest by March 18, 1979, failing which they would not be considered for regular appointments. As the Board did not give effect to its representations and decisions, the graduate engineers employed as Assistant Engineers or Junior Engineers started agitating for implementation of the Board's decisions from time to time. Ultimately, on March 8, 1979, at a high level meeting where the Speaker of the Legislative Assembly presided, the Chief Minister was present and among others participating in the meeting were the Commissioner of Irrigation and Electricity, the Dhairman of the Board and the Secretary of Irrigation and Electiricity, it was decided :

"After completion of one year's training (which is October 1979) as decided by the Board they will be appointed in the post of Assistant Electrical Engineer and Junior Electrical Engineer on 'provisional regular basis'. After appointment they will remain on probation for two years. During the probation period if their conduct is found satisfactory on the availability of permanent posts and on the basis of inter se seniority in the cadre they shall be confirmed."

"They will be appointed on regular basis after the completion of training period and examination as proposed vide office order No 1548 dated 26-10-78 will not be taken.

The Board communicated the aforesaid decision to the Project Managers and Thermal Power Stations of the Board, yet the decision was not implemented and the apprentice engineers continued to serve as Assistant Engineers and Junior Engineers on ex cadre basis, without security and stability of service. Some unemployed Engineers approached the High Court at Patna challenging the continuity of the trainee Engineers in the employment of the Board. The Board took the stand before the High Court the trainees engineers belonged to a separate class and held ex cadre appointment as Assistant Engineers and Junior Engineers. The High Court took the view that their continuity on ex cadre

isis was not open to challenge on the
round of non-compliance of Rules.
May, 1980, these writ petitions
ere dismissed. Emboldened by the
ceptance of their stand by the High
ourt, the Board started exhibiting a
egative apporach in its treatment to-
ards the trainee engineers. Ultima-
ly the appellants moved the High
ourt for a direction to the Board to
cadre them but failed. These appe-
s are directed against the decision
the High Court.

2. A few important aspects em-
ge from the record (1) the Board did
present to the trainee engineers from
me to time that after their training
as completed, they would be absor-
d in regular employment of the
oard; (2) when some of the engin-
rs were getting age-barred for Gov-
nment employment and had left the
oard, they were told to come back
der the temptation of getting per-
anently employed under the Board;
when the Board was reeling under
strike of its employees, these trai-
e engineers had stood by the Board
keep up the generation and distri-
tion of electricity and had been
sured of absorption; and (4) the
oard had decided to absord them on
rmanent basis but initially on a pr-
ation of two years without conduc-
g any further examination.

3. On March 13, 1979, a notice
s issued by the Board to the foll-
ving effect.

"A decision regarding regular
nployment of degree and diploma traninees of Bihar State Electricity Board in the posts of Assistant Electrical Engineer and Junior Electrical Engineer has been taken by the State Government. On completion of their training in October, 1979, their regular appointments will be made. Therefore, those trainees who have left their training are informed to join at the places of their respective postings latest by 18-3-1979. Those trainees who will not present themselves by the said date will be neither considered for being taken in training nor their regular appointments will be considered".

On April 26, 1979, the Board approved the proposal contained in the proceedings of a meeting relating to absorption of the appellant engineers in which the Speaker of the Legislative Assembly presided and the Chief Minister, the Commissioner of Irrigation and Electricity the Chairman of the Board and the Secretary of Irrigation and Electricity participated. The proceedings, inter alia, stated:

"(1). It was decided that after completion of one year's training (which is October, 1979) as decided by the Board, they will be appointed in the posts of Assistant Electrical Engineers and Junior Electrical Engineers on provisional basis. After appointment, they will remain on probation for two years. During probation period if thier conduct is found satisfactory and on the availability of permanent posts and on the basis of inter se seniority in the cadre, their appointments will be confirmed.

(2) They will be appointed on regular basis after the completion of the training period and the examination proposed vide office order No. 1548 dated 26-10-1978 will not be taken

X X X X X X

(9) It is also decided that the benefit of regular appointment is being given to the trainees under special circumstances which will not be an example for the future and when either under the Apprenticeship Act or under any other scheme anyone is taken as apprentice, he will be discontinued after the period of apprenticeship. In any circumstance, neitner period of apprenticeship will be extended nor will they have any claim for appointment under the Board."

4. We have referred to these two documents out of several of them avilable on the record to show that the Board was aware of the position that these trainee engineers formed a special class and very peculiar circumstances warranted a definitely special treatment in regard to them, yet it is unfortunate that a statutory body like the Board has failed to stand up to its representations made from time to a group of engineers who had spent years of their valuable life for qualifying themselves as engineers and who believing the representation of the Board and acting upon the same continued to remain in the employment of the Board as trainee engineers foregoing opportunities available to seek other employments and in the process have become age.barred for any public employment. This Court almost a score of years back in clear language indicated in Union of India v. Indo-Afghan Agencies (1968) 2 SCR 366 :

"Under our jurisprudence, the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an exparte appraisement of the circumstances in which the obligation has arisen".

Shah, J. as the learned Judge then was, quoted with approval what Chandrasekhara Aiyar, J. had said in Collector of Bombay v. Municipal Corporation (1952) 3 SCR 43 :

"Whether it is the equity recognised in Ransden's case (1866) LR 1 HL 129) or it is some other form of equity, is not of much importance. Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power." The legal position was reiteratee by this Court in Century Spinning & Manufacturing Co Ltd. v. Ulhasnagar Municipal Council (1970) 3 SCR 854 : where it was said (Paras 11 & 12):

"Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced ex contractn by a person who acts upon the promise; when the law reqires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation may be, if the contract be not in that form, enforced against it in appropriate cases in equity……"

This Court added a pithy observation:

> "If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot be permitted. A public body is, in our judgment, not exempt from liability to carry out its obligations arising out of of representations made by it relying upon which a citizen has altered his position to his prejudice."

In Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh (1979) 2 SCC 409, this Court went ahead to state that the 'doctrine of promissory estoppel, but it is a doctrine evolved by equity in order to prevent injustice and it can be basis of a cause of action.

5. In our view, the principle relied upon in these case has full application to the facts before us. The Board is a statutory authority and is 'State' within the meaning of Art. 12 of the Constitution. The Board has tried to seek shelter under a set of rules framed by it in exercise of the powers vested under S. 79 of the Electricity (Supply) Act of 1948. In the peculiar facts of the case we are of the view that the defence is illplaced and cannot hold as a shield against the application of the equitable doctrine. Admittedly, the trainee engineers before us formed a specific class and from time to time the Board treated them as members of a class and in its resolution of April 26, 1979, recognised this fact and swore to the position that such treatment should never be repeated even if apprentice engineers were appointed.

6. Learned counsel appearing for the Board indicated to us that the Board was prepared to regularise the employment of the appellants belonging to the category of the Assistant Engineers or Junior Engineers subject to their qualifying in the examinations and being formally recruited as required under the rules. They further emphasised that the appellants would not be entitled to seniority above those who have already been regularly employed under the Board.

7. So far as the first aspect is concerned, we have sufficiently pointed out already that the Board had waived the requirement of examination and had, while taking advantage of the services of the appellants when it was in need. delayed the implementation of its representations. "But it appears that several engineess have also been recruited either on permanent or temporary basis against regular vacancies and they are not parties to these appeals. The appellant therefore, cannot have seniority above those people and we would not be justified in making any direction which would prejudice their seniority behind their back. It appears

R. N. Misra
Judge
Supreme Court of India

that there have been recruitments even during the pendency of these appeals. While granting leave and while disposing of miscellaneous petitions for directions, this Court has already made it clear that appointments pendente lite would be subject to the result of the appeals. Therefore, the recruits of 1983 are bound to be subject to our direction. We are inclined to take the view that the appellants being already in employment of the Board much prior to 1983 on being taken into regular appointment of the Board have to rank above the recruits of 1983 and in the years thereafter.

8. The Board in our view is, therefore, bound to regularise the appointments of the appellants who had been taken as trainee engineers initially and have continued to be in the employment of the Board. In this view of the matter the after hearing was over we issued mandamus to the Board to offer regular appointment to the appellants with in three months from that day, i.e. May 3, 1985, in the appropriate cadre of Assistant Engineer or Junior Engineer, as the case may be, and such appointments were to be on drobation for a period of two years as required under the rules. In regard to seniority the appellants have to rank below permanent and temporary recruits to the regular posts of engineers beld under the Board prior to 1983 and they shall be assigned seniority above such recruits pendente lite. We have now indicated the reasons by our judgment. The appeals are allowed and the judgment of the High Court is reversed and the Board and is directed to give effect to the directions indicated above within the specified time.

9. We hope and trust that the Board will not conduct itself in such an embarrassing way in future and land itself in difficulty again.

10. The appellants shall have their costs throughout. One set of hearing fee assessed at Rs. 5,000/- shall be admissible in this Court.

Appeals allowed.

R. N. Misra
Judge
Supreme Court of India

OBSERVATION

**Payment of Gratuity Act (39 of 1972), Sections 4, 5, 13 and 14—Gratu-
y payable to workman employed under Calcutta Dock Labour Board—Not li-
le to attachment for satisfaction of decree.**

OBSERVED BY

P.N. Bhagwati and
Ranganath Misra,

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 345 of 1985, decided on 11-2-1985, between Calcutta
ock Labour Board and another, Appellants v. Smt. Sandhya Mitra and others,
spondents.

TEXT

Ranganath Misra, J.:- Special
ve granted.

The short question which falls
decision in this appeal is wheth-
gratuity payable to a workman em-
yed under the Calcutta Dock Lab-
Board (hereinafter referred to as
ard') is attachable for satisfaction
a decree of the Court. Mr. Sa-
Rehman was a dock worker and
tuity was payable to him under one
he three prevailing schemes of the
ard. Respondent I filed a suit
ore the Court of Small Causes at
lcutta asking for recovery of a sum
money against the widow and son
he said Md. Safiur Rehman after
death and prayed for attachment
the gratuity payable to the said
kman. The Court made an order
called upon the Board to withho-
payment of the amount whereupon
the Board pointed out to the Court that gratuity was not liable to attachment. On receipt of such intimation, the Court made an order requiring the Board to show cause as to why it may not be proceeded against for disobedience of the Court's direction. The Chief Judge of the Court of Small Causes examined the objection against attachment and overruled the same. Against the rejection of the objection appellants moved the High Court at Calcutta and contended that the gratuity payable to the workman was not liable to attachment A Division Bench of the High Court examined the tenability of the contention and came to the following conclusion;

"On a careful consideration of the legal position we, however, find that the learned Chief Judge is right in his conclusion. Plaintiff has a legal right to attach any debt payable to his debtor legal representative. This right, however, is always subject to exceptions made by any statutory provision. Section 13 of the Payment of Gratuity Act no doubt bars attachment but that only is in respect of gratuity payable under that Act. The gratuity now under attachment is payable not under the Act. Section 60 of the Code of Civil Procedure as amended may bar attachment of gratuity as now under consideration. But that section as it now stands had not been made applicable to Presidency Small Cause Courts. Under Section 8 of the Code, the High Court adopted certain provisions of the Code including Section 60 as amended up to 1965 and made them applicable to Presidency Small Cause Courts, Section 6, Clause (g) so adopted reads as follows:

'(g). Stipends and gratuities allowed to pensioners of the Government or payable out of any service,family pension fund notified in Official Gazette by the Central Government or the State Government in this behalf and political pensioners ' This clause dose not cover the gratuity payable by the Board to a registered dock worker and the subsequent amendment of this clause not having been adopted and made applicable by the High Court to Presidency Small Cause Court, the learned Chief Judge is right in his conclusion.

Next reliance is placed on Rule 9 of the Gratuity Rules which no doubt purports to exempt gratuity from attachment. But these rules not having been made by the Central Government on powers delegated by the Parliament under the Dock Workers (Regulation of Employment) Act, but by the Board on sub delegation of powers under the scheme, the same in our view cannot override the legal right of the plaintiff".

2. Mr. Mukherjee appearing for the appellants maintained that the view taken both by the Chief Judge of the Small Cause Court as also the Division bench of the High Court is contrary to law and, therefore, cannot be sustained. The respondents had filed an appearance throuqh counsel but no one participated in the hearing.

3. Section 1(3) of the Payment of Gratuity Act (39 of 1972) (Act' for short), provides that the Act shall extend to ports. 'Port' has been defined in Section 2 (n) of the Act. There can be no dispute that the Calcutta Port is covered by the Indian Ports Act, 1908. It is true that under one of the three schemes framed by the Calcutta Dock Labour Board gratuity was payable to Md Safiur Rehman, but such gratuity must be taken to be covered by Section 4 of the Act, in the absence of any notification contemplated under Section 5, authorises the appropriate Government by notification and subject to such conditions as may be specified in that notificaton to exempt, inter alia, any port to which the Act applies, fom the operation of the provisions of the Act, if in the opinion of the appropriate Government the employees in the port are in receipt of gratuity or pensionary benefit not less favourable than the benefits conferred

ınder the Act. Neither the Chief Judge ıor the High Court has found that here has been a notification as contemlated under Section 5 of the Act in this ase. It had also not been contended at ny stage by the respondents that such notification had been made.

4. Reference may now be made to ections 13 and 14 of the Act which are ery-relevant.

"13. Protection of gratuity—No

ratuity payable under this Act shall be able to attachment in execution of any ecree or order of any civil, revenue or iminal court".

14. Act to override other enactıent, etc. :—

he provisions of this Act or any rule ade thereunder shall have effect notwiıstanding anything inconsistent thereith contained in any enactment other ıan this Act or in any instrument or ontract having effect by virtue of any ıactment other than this Act".

5. We may point out that by Cenal Act No. 25 of 1984 Section 13 has een amended with effect from July 1, 84, and the amended section reads us :—

"No gratuity payable under this Act d no gratuity payable to an employee ıployed in any establishment, factory, ine. oilfield, plantation port, railway mpany or shop exempted under Sec. shall be liable to attachment in execuon of any decree or order of any civil, venue, or criminal Court". In the abnce of any notification within the eaning of Section 5 of the Act the amendment is not relevant for cousideration. Section. 14 has overriding effect and Section 13 gives total immunity to gratuity from attachment. The Preamble of the Act clearly indicatcs the legislative intention that the Act sought to provide a scheme for payment of gratuity to all employees engaged in, inter alia, ports and under this Act gratuity was payable to workers like Md. Safiur Rehman. The grat- ers like Md. Safiur Rehman. The gratuity which was payable to him squarely came within the purview of the Act and, therefore, became antitled to immunity under Sec. 13 thereof.

6. In Section 60 of the Code of Civil Procedure provision for exemption from attachment has been made and a detailed list has been provided in sub- section (1) thereof in clauses (a) to (q). Clause (g) thereof exempts stipends and gratuities allowed to pensioners of the Government or of a local authority or of any other employer from attachment. It may be pointed out that the words "local authority" or "other employer" were inserted into the statute by the amending Act of 1976 with effect from February 1, 1977. The Chief Judge as also the High Court relying on the provisions of Section 8 of Code took the view that unless extended by the High Court of Calcutta, the protection of Section 60 was not available in regard to proceedings before the Presidency small Cause Court at Calcutta. It appears that the Calcutta High Court in exercise of power under Section 8 of the Code had estended the provision of the Section

R. N. Misra
Judge
Supreme Court of India

60 of the Code but the High Court seems to have wrongly taken the view that the effect of Section 97 of the Amending Act of 1976 was that the notification of the High Court was no more effective unless re-made. It is wholly unnecessary for the disposal of this appeal to examine that aspect as in our view the immunity under Section 13 of the Act is adequate to accept the appeal and find against the respondent. We, therefore, allow the appeal and hold that the Chief Judge as also the High Court were in error in taking the view that gratuity payable to Md. Safiur Rehman was liable to attachment. Parties are directed to bear their own costs.

Appeal allowed.

eport No. 88, p. 01

O. Chinnappa Reddy
Judge
Supreme Court of India

OBSERVATION

(A) Evidence Act (1 of 1872), S. 3—Appreciation of evidence—Criminal cases Witnesses, Govt. Servants or police officers assisting investigation agencies—Their dence cannot be rejected merely on that count—Decision of Gujarat High Court, versed— (i) Penal Code) (45 of 1860), S. 161—(ii) Prevention of Corruption Act of 1947), Ss. 5 (1) (d), 5(2)—(Criminal trial—Appreciation of evidence—Rejection evidence of a witness by giving him a label, not permissible).

(B) Evidence Act (1 of 1872), Ss. 115, 114—Non-production of material witness Bribery case—Failure of prosecution to examine an inspector who assisted Dy. S. P. fetch Panch witnesses—Witness, not a material witness—Prosecution offering witness cross-examination—Counsel of accused not taking advantage of the same—Held, was not open to accused to comment upon the so-called failure of prosecution to amine the Inspector, nor the Court could draw adverse inference against prosecun.

(C) Prevention of Corruption Act (2 of 1947), Ss. 5 (2) and 5(1) (d)—Convicn under S. 5 (1) (d) r/w S. 5 (2) as also under S. 161, Penal Code—Sentence—Accu-l, an Income-tax Officer—Long time elapsed since commission of offence—Accu-l, also retired from service—Accused taking large amount as bribe—Loss to public venue—Held there was no special circumstances justifying Court taking lenient w.

OBSERVED BY

O. Chinnappa Reddy and
E. S. Venkataramiah,

Hon'ble Judges, Supreme Court of India.

IN

Criminal Appeal No. 180 of 1976, decided on 16-4-1985, between State of Gujarat, ppellant v. Raghunath Vamanrao Baxi, Respondent.

TEXT

O. Chinnappa Reddy, J. :— The spondent was an Income-tax Officer. was tried and convicted by the Addinal Special Judge, Ahmedabad of fences under S. 161, Penal Code and 5(2) read with S. 5 (1) (d) of the Prevention of Corruption Act. He was sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 2,000/- on each of the two counts. On appeal, the High Court of Gujarat acquitted the accused of both the offences. The State of Gujarat has preferred this appeal by special leave of this court under Art. 136 of the Constitution.

2. The case of the prosecution briefly was as follows ;

One Shashi Kant Mansukh Lal Sheth (P.W.2) was the Managing partner of a firm known as M/s. Hind Fertilizers, Bhavnagar. The assessments for the years 1968-69, 1869-70, 1970-71 and 1971-72 were pending before the accused Income-tax Officer. Between June and October 1971, there were nine hearings of the case. On 7-3-72, Laxmikant Sheth (P. W. 7) the Income-tax practioner who was representing the firm, received a notice directing the firm's representative to attend his office on 14-3-72 with the firm's books of account and to show cause why sums totalling Rs. 1,94,378 should not be added to their returns of income for the years in question. The firm felt that the notice was not justified. As P.W.7 would be busy on 14-3-72, it was decided that they would go to the income-tax office with their books of account on 13th itself. On 10-3-72, Shashi Kant Sheth (P. W. 2) contacted the income-tax officer on the telephone and the latter asked him to meet him at his residence at 2.00 P.M. Shashi Kant went to the house of accused at Bhavnagar that afternoon. He was told to come again on the evening of 13th. On the 13th, P. Ws. 2 and 7 went to the offiice and submitted the reply to the show cause notice. The accused wanted them to meet him again on 14th. P. W. 7 said he was busy on 14th. The accused then asked P.W. 2 to come alone. As previously agreed on 10th, Shashi Kant went to the house of the accused on the night of 13th when the accused told him that the clarification given by the firm was not satisfactory and that they would have to pay a sum of about Rs. 1,25,000/- by way of tax unless a sum of Rs, 40,-000 was given to him as a bribe. On P.W. 2 pleading his inability to pay such a large sum, it was settled that a sum of Rs. 12,500 should be paid. P. W. 2 wanted to consult his partner. He was told by the accused that he should bring the amount to his house on the evening of 14th March, 1973. Thereafter, Shashi Kant contacted Shri Judeja, Deputy Superintendent of Police, CBI who was camping at Bhavnagar. Shashi Kant complained to him about the demand of bribe of Rs. 12,500 by the accused Shri Judeja then took the necessary steps for laying a trap Two officers of the postal department, Shri Parikh, Manager, Postal Store Depot, Ahmedabad (P. W. 3) who was staying in the guest-house, and Shri Panchal, an officer of the Postal Department stationed at Bhavnagar itself were requested to serve as panch-witness Shashi Kant was asked to bring currency notes of the value of Rs. 125,00. The notes were treated with phenolphthalein powder. Shashi Kant put the notes in his pocket. He was instructed to go to the house of the accused accompanied by Parikh and to tender the amount to the accused. On the accused receiving the amount, Shri Parikh was to come out of the house and signal the police party to come. A panchnama stating all these facts was duly prepared at the guest-house. There

er, as arranged, the raiding party
oceeded towards the house of the
cused. Shashi Kant and Parikh, P.W.
and 3, went inside. Shashi Kant
roduced Parikh to him as a member
his staff. They chatted generally for
ne time. The accused then mentio-
d about the amount to be paid to
n whereupon Shashi Kant handed
er the bundle of currency notes to
n. The currency notes were received
the accused who carefully put them
a newspaper, and folded the news-
per. Parikh then went out and
nalled to the police party. Judeja,
. Supdt. of Police P.W. 9, the other
nch-witness Panchal and the rest of
police party rushed inside. The
tes were seized. The accused was as-
d to dip his fingers in a solution of
arbonate. The solution turned pink.
ereafter, the panchnama was pre-
red. After the investigation was duly
mpleted, the respondent was charge-
eeted for the two offences of which
was ultimately convicted.

3. The defence of the accused was
t the prosecution case was false.
ashi Kant came to his house with a
anger on the night of 14-3-72. He
s surprised at his visit, but for the
ce of courtesy, he asked him to sit
wn and asked him the purpose of his
it. Instead of reply him, Shashi Kant
d the stranger stated talking about
litics to him. He told him that he was
ublic servant and he was not interested
politics. He also told him that he wan-
d to go to feed. He went to the toilet
a few minutes and when he returned, Shashi Kant and the stranger stood up and went away after shaking hands with him. A few moments later they returned with the police party. They must have planted the notes in the newspaper which was lying on the table when he had gone to the toilet.

4. It is seen from the facts narrated above that the meeting of Shashi Kant and Parikh with the accused on the night of 14-3-72 at 8.00 P.M. is not disputed. It is also not disputed that Shashi Kant and Parikh talked to the accused for quite a considerable time, nearly 40 minutes. It is further not disputed that within a few moments after Shashi Kant and Parikh left the accused Judeja, Panchal and rest of the police party entered the house of the accused and currency notes of the value of Rs. 12,500/- were seized from the folds of a newspaper lying on the table. The accused was present all the time and there was no protest by him. That the fingers of the accused were also dipped in some solution is not disputed. The only question is whether the amount of Rs. 12,500 was received by the accused as a bribe or whether the amount was planted by Shashi Kant and Parikh during the brief visit of the accused to the toilet. The learned Sessions Judge accepted the evidence of Shashi Kant, Parikh and Judeja and convicted the accused as aforesaid. The High Court, however, took a remarkably curious view of the evidence and acquitted the accused. The High Court narrated several circumstances, one after another, why the

prosecution case should not be accepted. We have considered every one of the circumstances and we find that there is not a single satisfactory circumstance reasonably justifying the acquittal. On the other hand we find that everyone of the circumstances is overstated and fanciful.

5. The most important circumstance which seems to have weighed heavily with the High Court, almost to the point of obsession, was that Parikh and Panchal were not independent witnesses as they were both government servants and as they had some previous acquaintance with Inspector Sharma who was assisting Judeja in the investigation. The High Court was of the view that some other respectable residents of Bhavnagar should have been called as Panch-witnesses to be associated with the raid. We are afraid the High Court has entirely misdirected itself in appreciating the evidence. In their approach to the evidence, the High Court has done injustice to the witnesses and this has resulted in a grave miscarriage of Justice. In appreciating oral evidence, the question in each case is whether the witness is a truthful witness and whether there is anything to doubt his veracity in any particular matter about which he deposes. Where the witness is found to be untruthful on material facts that is an end of the matter. Where the witness is found to be partly truthful or to spring from tainted sources, the Court may take the precaution of seeking some corroboration, adequate and reasonable to meet the demands of the situation, but a court is not entitled to reject the evidence of a witnesses merely because they are government servants, who, in the course of their duties or even otherwise, might have come into contact with investigating officers and who might have been requested to assist the investigating agencies. If their association with the investigating agencies is unusual, frequent or designed, there may be occasion to view their evidence with suspicion. But merely because they are called in to associate themselves with the investigation as they happened to be available or it is convenient to call them, it is no ground to view their evidence with suspiction. Even in cases where officers who, in the course of their duties, generally assist the investigating agencies, there is no need to view their evidence with suspicion as an invariable rule. For example, in rural areas, investigating officers would ordinarily think of calling in the village officers, such as, the Headman, the Patel or Patwaṛi to act as-punch witnesses, as they are expected to be respectable persons of the locality. It does not mean that their evidence should be viewed with suspicion because they are government servants or because they are generally associated with investigating agencies whenever there is a crime in the village. For that matter it would be wrong to reject the evidence of police officers either on the mere ground that they are interested in the success of the pro-

ıtion. The court may be justified in
cing with suspicion upon the evid-
e of officers who have been demon-
ted to have displayed excess of zeal
he conduct and success of the pro-
tion. But to reject the evidence of
official witnesses as the High Court
done in the present case, is going
far. We think that it is extremely
air to a witness to reject his evid-
e by merely giving him a label.

6. There were two panch witnesses
ikh and Panchal of whom Parikh
been examined as P.W. 3 while
chal has not been examined. We have
en through the whole of the deposit-
of Parikh and we find nothing
tever to doubt his veracity. Nothing
suggested to him as to why he
uld give false evidence to implicate
accused. All that was elicited from
was that he had worked as depart-
ntal inquiry officer and also to defend
nquents in such inquiries in his
artment. He had become acquainted
1 Inspector Sharma fifteen days
ore March 14, 1972 as he was
ending a delinquent at Bhavnagar
case in which Shri Sharma was
prosecuting officer. Shri Panchal,
was Assistant Superintendent of
t Offices, Bhavnagar was the
uiry Officer in that case. This is
ed to be the "close association" of
two panch witnesses with the
estigating agency in this case. It is
possible to subscribe to this view.
en Judeja, Deputy Superintendent of
ice asked Inspector Sharma to get
independent panch witnesses, Parikh was readily avilable in the guest house and he had known Panchal as the Inquiry Officer in a departmental inquiry in the Postal Department. Both of them being Government servants belonging to a different department, if Inspector Sharma thought that they could be called as independent xanch witnesses we are unable to impute any-motives to the investigating agency or to cast aspersions on the witnesses Parikh and Panchal. We do not have any doubt in accepting the evidence of Parikh as that of an independent witness. Having examined his evidence in detail, we find his evidence to be truthful. His evidence substantiates the evidence of P.W.2 about the acceptance of the bribe by the accused and his keeping the money in a folded newspaper. If we accept the evidence of P.Ws.2 and 4, the prosecution case that the money was given as a bribe must be accepted and the defence version that the money was planted must be rejected.

7. The other circumstances upon which the High Court relied are very trivial and it is unnecessary to burden this judgment with a seriatim discussion of those circumstances. For example, one of the circumstances was that if the accused had arranged that P.W. 2 should come to him on the evening of 14th with the bribe, he would have been waiting in his house to receive him with the doors of the house open so that the bribe-giver may walk in stright and he was not likely to have kept the doors closed and wait for the bribe-giver to knock at the door. We consider it

needless even to comment upon this circcumstance. Another circumstance upon which the High Court relied was that the accused was not likely to have talked with P.Ws 2 and 3 for as long as 40 minutes if he was accepting a bribe. He would have meerly received the money and sent them away. The very fact that he was talking to them for nearly 40 minutes indicated that no bribe was given or taken. On the other hand, we consider that this is a strong circumstance against the accused. The accused knew that P.W. 2 was an assessee who had a pending case before him. If the assessee paid him a visit after 8.00 P.M. at his residence, one would expect the accused to immediately suspect the reason for the visit and to turn him away at once or at least within a few minutes after his coming to his house. Instead of that, he takes them inside the house, talks to them for nearly 40 minutes. This conduct of the accused is clearly against his innocence. Some question was raised that the solution which according the to investigating officer and the panch witness turned pink when the accused was asked to dip his fingers in it, had become yellowish when the chemical examiner examined the solution. Nothing really turns on this in view of the evidence of P.Ws. 2 4 and that of the investigating officer P.W;9.

8. A point was sought to be made in this court of the failure of the prosecution to examine Inspector Sharma as a witness. All that Inspector Sharma did in the case was to assist Judeja, Deputy Superintendent of Police and to fetch the two panch witnesses when he was asked to do so. He could not by any means be called a material witness. As some comment was made during the course of the trial about the failure of the prosecution to examine Inspector Sharma, the prosecution offered him for cross examination and kept Inspector Sharma ready in court. The counsel for the accused stated that since the witness had already been dropped by the prosecution, he did not want to examine him unless the court direted him to do so. After the failure of the counsel of the accused to take advantage of the offer made by the prosecution, we do not think that it is open to the accused to comment upon the so-called failure of the prosecution to examine Inspector Sharma as a witness. Nor can we draw any adverse inference against the prosecution. On this question, the High Court took the same view as we do.

9. From the evidence of P.Ws. 2,3 and 9, we do not have the slightest doubt that a sum of Rs. 12,500/-was paid to and received by the accused as a bribe. The learned Sessions Judge was clearly right in convicting the accused and the High Court was wrong in acquitting the accused. We do not think that this is a case where two views were reasonably possible. The only possible view was that the accused was guilty and we hold him guilty of both the offences under S. 161 IPC and S. 5 (2) read with S. 5 (1) (d) of the Prevention of Corruption Act, 1947. The learned counsel for the accused argued

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O. Chinnappa Reddy
Judge
Supreme Court of India

t in view of the long time that has
psed since the commission of the
ence and in view of the circumstance
t the accused has also retired from
vice, we may take a lenient view and
sentence the accused to any term
imprisonment. But under S 5 (2) of
Prevention of Corruption Act,
7, the minimum sentence that can
imposed is imprisonment for one
r and the maximum sentence is seven
rs. However the court, for any
cial reasons to be recorded in
ting, may impose a sentence of
prisonment of less than one year.
are unable to find any special
cumstance in this case justifying our
ing a lenient view. Corruption has become so rampant in the country and the offience in this particular case cannot be considered trivial at all. This is not a case of a petty clerk or a peon accepting a small amount as a bribe for doing some little favour. We cannot possibly take a lenient view of the conduct of an income tax officer, who accepts a large amount as a bribe for causing loss to public revenue. We think that the sentences imposed by the learned Sessions Judge were the right sentences to be imposed on the accused. The judgement of the High Court is set aside and that of the learned Special Judge is restored. The accused will surrender to his bail.

Appeal allowed.

653

Report No. 88, P 08

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

O. Chinnappa Reddy
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Arts. 309, 311—W.B. Services (Determination of Seniority) Rules, (1981), Rr. 6, 3—Seniority between direct recruits and promotees—Fixation—General principle applicable is continuous officiation in non-fortuitous vacancy—Recruitment and seniority rules applicable to Sub-Inspectors in Calcutta Police make no departure from general principle—Seniority of promotee Sub-Inspectors must be reckoned from date of their continuous officiation and not from date of confirmation.

OBSERVED BY

R.S. Pathak, Chinnappa Reddy
and R. B. Misra,

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeals Nos. 440-401 of 1984, decided on 24-4-1985, between Pran Krishan Goswami and others, Appellants v. State of West Bengal and others, Respondents.

TEXT

O. Chinnappa Reddy, J. :— The Wars of the Reses go on How else is one to describe the perpetual battles waged between the 'direct recruits' and the 'promotees'? This time the front is the Calcutta Police, the Posts are those of Sub-Inspectors of Police and the question is the same old one of seniority. Petitioners 1 and 2, who joined the Calcutta Police as Constables in November 1947 were first promoted as Assistant Sub-Inspectors of Police and later, on August 6, 1957, as officiating Sub-Inspectors of Police. They were confirmed as Sub-Inspectors of Police on January 1, 1975. In the meanwhile, a large number of persons were directly recruited as Sub-Inspectors of Police and also confirmed as such. All of them are now ranked above the petitioners in the seniority list, and the petitioners, therefore, have a natural grievance. They claim that as laid down by a series of decisions of this court, their seniority must be reckoned from the date of their continuous officiation as Sub-Inspectors of Police, Petitioner No. 3, we may mention, was promoted as officiating Sub-Inspector of Police on September 6, 1975, but the precise date of his confirmation is not available from the record. Apart from the claim to seniority, the petitioners also alleged that they were never considered for promotion to the next higher post of Inspector of Police because of their delayed confirmation and because of the insistence of the Rules that they should be confirmed as Sub-Inspectors of Police before they could be considered for promotion to the post of Inspector of Police. They want the offending rule to be puashed. Other reliefs were claimed in the writ petition filed by them in the High Court, but we are not now concerned in this appeal with those other reliefs. While the State of West Bengal appeared to su-pport the claim of the appellants to seniority on the basis of continuous officiations, the direct-recruits contested the writ petition in the High Court. The High Court refused to recognise the claim of the appellants to seniority from the dates of their continuuos officiation on the ground that their promotion as officiating Sub-Inspectors of Police could only be considered as promotion to posts outside the cadre. The High Court held that their seniority could only be reckned from the date of their confirmation. The High Court further held that the rule prescribing cofirmation as Sub-Inspector as a condition precedent for promotion to the post of Inspector of Police was not invalid. The promotee' Sub-Inspectors have preferred this appeal by special leave of the court under Art. 136 of the Constitution.

2. It is necessary now to refer to the various recruitment and seniority rules made from time to time under the powers conferred by the statute. Rule 2(b) of the Recruitment Rules for the Subordinate Ranks of the Calcutta Police, 1936 provided that twenty-five per cent of the vacancies shall be filled by promotion of Assistant Sub-Inspectors and Sergents and the rest by direct recruitment. Rule 2(f) prescribed the qualification for outside candidates meaning thereby direct-recruits. What is important to be noted is that they were required to be Graduates of a University. Rule 2(g) prescribed the qualifications for departmental candidates and it is necessary to extract the whole of it, which is as follows :—

"(g) Qualifications for departmental candidates-On the first of June, nominations shall be called for from all District Officers of Assistant Sub-Inspectors. and Sergeants fit for promotion to the rank of Sub-Inspectors. Nominees shall have had at least 3 years' service as Sergeant or Assistant Sub-Inspectors, be less than 40 years of age and normally have passed one of the following examinations—

(1) Matriculation or the Indian. Army Special Certificate of Education.

(2) Junior Cambridge,

(3) First Class Army Certificate,

or have, in the opinion of the Selection Board, otherwise attained a satisfactory educational standard. They shall sit in a preliminary departmental test examination at the Calcutta Police Training School. The names of all nominees who pass that examination shall be submitted to the Selection Board. The candidates shall have :—

(i) a good record of service and
(ii) a good social position;

The judge of this should be the Selection Board. Note— On passing out of the Calcutta Police Training School officers shall remain on probation prior to confirmation."

Rule 2 (j) which applied both to outside and departmental candidates was as follows :

"(j) Qualified candidates shall be summoned before a Selection Board consisting of the Commissioner of Police, the Deputy Commissioner of Police, Headquarters, a District Deputy Commissioner, and an Assistant Commissioner of Police. The Selection Board shall make the final selections for appointment."

3. The Probation Rulles for the Subordinate Ranks of the Calcutta police, 1936 prescribed that for Sub-Inspectors, the period of probation of a person directly recruited or of an officer who was promoted from a lower rank shall be two years counting from the date of his joining the Calcutta Police Training School. While Rule 2 sub-rule (3) provided that persons directly recruited shall draw the minimum pay in the time Scale of Sub-Inspectors throughout the period of their probation Rule2 Sub-rule (4) provided that promoted officers shall draw the minimum pay in time-scale of Sub-Inspectors, subject to the condition that they shall count towards increment, officiating and temporary service in that rank rendered prior to their appointment as probationers and also their probationary period or any part thereof and draw increment that may fall due to them during the period of their probation It was further stipulated that a probationer shall be confirmed on the termination of his probationary period unless the Deputy Commissioner in charge of a District shall during the period of probation make an order extending this period of probation or discharging him from service or reverting him to his substantive rank. All order of extension of porbation was not to extend beyond one year, except with the sanction of the Commissioner of Police.

4. By an order dated December 16, 1940, it was provided that when determining the relative seniority of probationary Sub-Inspectors in the Calcutta Police, the following principles were to be observed :

"(1) Departmentally appointed Sub-Inspectors will be senior to direct recruits of the same year and will be graded inter se according to the date of their confirmation in the rank of Assistant Sub-Inspector.

(2) The seniority of directly recruited Sub-Inspectors will be in accordance with their position in the final examination at the Police Training School"

5. In suppersession of this order, a further order was issued on December 14, 1960 laying down the principles to be followed in determining the relative seniority of probationary Sub-Inspectors of the Calcutta Police The princi-

ples were as follows :—

"(1) The seniority of departmentally promoted and directly recruited Sub-Inspectors will be determined in accordance with the dates of their probationary appointment in the rank.

(2) Where a departmentally promoted Sub-Inspector and a directly recruited Sub-Inspector are appointed on probation with effect from the same date, the departmental officer will be senior to the direct recruit, provided they undergo training at the Police Training College the same year

(3) The seniority of the directly recruited Sub-Inspectors will be in order of their position in the final examination held at the Police Training College and that of the departmentally promoted officers be in accordance with their position in the approved list of officiating Sub-Inspectors, fit for confirmation in the rank of Sub-Inspector."

6. In 1962, the Calcutta and Suburban Police (Subordinate Ranks Recruitment, Conditions of Service and Discipline) Rules were made. Schedule 1 prescribed the method of recruitment, qualifications for appointment including age and conditions of service. Paragraph 2 of the Schedule dealt with Sub-Inspectors not belonging to the Armed Branch and to the extent it is relevant, is extracted below :

"Sub-Inspectors not belonging to the Armed Branch

2. (1) Method of recruitment : Recruitment in the rank of Sub Inspector shall be made each year in the month of January. Twenty five per cent of the vacancies shall be filled by promotion of Assistant Sub-Inspectors and the remaining vacancies shall be filled by direct recruitment.

(2) For filling up vacancies by promotions candidates shall be selected on the basis of merit only.

(3) (a) For filling up vacancies by direct recruitment applications from outsiders shall be invited through the press in the 1st week of August...........

(b) & (c) ......

(4) Qualifications for outside candidates—The candidates shall—

(i) be graduates of one of the Indian Universities;

(ii) to (v)......

(5) Qualifications for departmental candidates— On the first day of June every year nominations shall be called for from all Deputy Commissioners of Assistant Sub-Inspectors fit for promotion to the rank of Sub-Inspector. Nominees shall have had at least 3 years of service as Assistant Sub-Inspector, be less then 40 years of age and normally have passed one of the following examinations :

(a) Matriculation, School Final or Higher Secondary Examination or the Indian Army Special Certificate of Education Examination;

(b) Junior Cambridge Examination;

(c) First Class Army Certificate Examination;

or have, in the opinion of the Selection

Board referred to in sub-rule (7), otherwise attained a satisfactory educational standard. They shall be required to sit in a preliminary departmental test examination. The names of all nominees who pass that examination shall be submitted to the said Selection Board. The candidates shall have in the opinion of the said Selection Board a good record of service.

Note—Selected candidates shall have to undergo a course of training in the Police Training College On passing out of the Police Training College, officers shall remain on probation prior to confirmation.

(6) ... .

(7) Qualified candidates shall be summoned before a Selection Board consisting of the Deputy Commissioner. Headquarters, a Divisional Deputy Commissioner and an Assistant Commissioner of Police. Appointment shall be made of candidates included in an approved list of candidates prepared on the recommendation of the Selection Board

(8) ... .”

7. Paragraph 19 of Schedule I deals with the probation of Sub-Inspectors, and to the extent necessary it is extracted below :—

“Sub-Inspectors

19. (1) The period of probation of a person directly recruited as a Sub-Inspector shall be two years counting from the date of leaving the Police Training College and that of an officer promoted as a Sub-Inspectors from a lower rank shall be one year counting from the date of joining the Police Training College on such promotion.

(2) ... ...

(3) Promoted Sub-Inspectors shall draw the grade pay in the time-scale of Sub-Inspectors, subject to the conditions that they shall count towards increment officiating and temporary service in that rank rendered prior to their appointment as probationers and also their probationary period or any part thereof and draw increment that may fall due to them during the period of their probation. A probationer Sub Inspector shall be confirmed on the completion of his probationary period unless the Deputy Commissioner, Headquarters, shall make an order extending his period of probation or discharging him from service or reverting him to his substantive rank. Any order for such extension of the probationary period or reversion or discharge shall indicate grounds on which the order is made. Such an order of extension shall not ordinarily extend the period of probation beyond one year. For extension for any period beyond one year, the sanction of the Commissioner shall be obtained.

(4) (a) The training period of promoted Sub-Inspector shall be one year, of which the first six months shall be spent in the Police Training College. The training period of direct recruits as Sub-Inspectors shall be two years of which one year shall be spent in the Police Training College.

(b) The initial pay of direct recruits as Sub-Inspectors when posted to the Police Training College shall be Rs. 200 per mensem, the minimum of the time scale of pay of Sub-Inspectors

(c) Such part of the training period of direct recruits as Sub-Inspectors as is spent in the Police Training College, namely one year, shall be exclusive of the probationary period and count towards increment of pay.

(d) The training period of promoted Sub-Inspector shall count towards increment of pay."

8. In 1967, the Police Regulations, Calcutta were framed under Section 3 of the Calcutta Suburban Police Act, 1866 and Section 9 of the Calcutta Police Act. Chapter XV dealt with method of recruitment, qualifications for appointment including age and conditions of service, Paragraph 3 of Chapter XV dealt with Sub-Inspectors not belonging to the Armed Branch. To the extent necessary, paragraph 3 is extracted again.

"3. Sub-Inspectors not belonging to the Armed Branch :

(1) Method of recruitment-Recruitment in the rank of Sub-Inspector shall be made each year in the month of January. One third of the vacancies shall be filled by promotion of Assistant Sub-Inspectors, and the remaining vacancies shall be filled by direct recruitment.

(2) For filling up vacancies by promotion candidates shall be selected on the basis of merit with due regard to seniority.

(3) (a) to (c) ... ...

(4) Qualifications for candidates for direct recruitment The candidates shall -

(i) ... ...

(ii) be graduates of one of the Indian Universities.

(iii) to (v) ... ...

(5) Qualified candidates shall be required to appear for an interview before a Selection Board cansisting of the Deputy Commissioner, Headquarters, and two other Deputy Commissioners nominated by the Commissioner. Appointment shall be made of candidates included in an approved list of candidates prepared on the recommendation of the Selection Board.

(6) ... ...

(7) Qualifications for departmental candidates—Nomination shall be called for as and when necessary from all Deputy Commissioners and of all Assitant Sub-Inspectors fit for promotion to the rank of Sub-Inspector. Nominees shall have had at least three years of service as Assistant Sub-Inspector and normally have passed one of the following examinations :

(a) Matriculation, School Final or Higher Secondary Examination or the Indian Army Special Certificate of Education Examination;

(b) Junior Cambridge Examination;

(c) First Class Army Certificate

Examination; or
have, in the opinion of Selection Board, eferred to in sub-rule (8) below otherwise attained a satisfactory educational standard.

They shall be required to sit in a departmental examination the procedure and syllabus for which shall be such as may be determined by the Commissoner.

(8) The names of all nominees who pass that examination shall be submitted to the Selection Board. The candidates shall have in the opinion of the Selection Board, good records of service. The Selection Board shall consist of Deputy Commissioner, Headquarters, and two other Deputy Commissioners nominated by the Commissioner.

(9) Candidates must have passed the departmental examination completely before they are interviewed by the Selection Board. Candidates shall be eligible for the examination referred to above after they are confirmed in the rank of Assistant Sub-Inspector.

Note-Selected candidates (both direct recuits and departmental) shall have to undergo a course of training in the Police Training College.

(10) An officiating Sub-Inspector having completed two years' continuous service in the rank and on completion of the required course of training shall be eligible for appearing before the Selection Board concerned for inclusion of his name in the panel of officiating Sub-Inspector fit for confirmation in the rank of Sub-Inspector."

9. Paragraph 46 may also be extracted here :

"(1) The period of probation of a person directly recruited as a Sub-Inspectress shall be two years counting from the date of leaving the Police Training College or School, as the case may be, and that of an officer promoted as a Sub-Inspector or Sub-Inspectress form the lower rank shall be one year counting from the date of his or her appointment on probation. Such part of the training period of direct or Sub-Inspectors recruits as Sub-Inspectors as is spent in the Police Training college or School, namely, one year, shall be exclusive of the probationary period and count towards increment of pay.

(2)................

(3) Promoted Sub-Inspectors including Sub-Inspectresses shall draw the grade pay in the time scale of Sub-Inspectors, subject to the condition that officiating and temporary service in that rack rendered prior to their appoinment as probationers and also their probationary period or any part thereof shall count towards increment and they shall draw increment that may fall due to them during the period of their probation. A probationary Sub-Inspector or Sub-Inspectress shall be confirmed on the completion of his or her probationary period unless the Deputy Commissioner, Headquarters, shall make an order extending his or her period of probation or discharging him or her from service or in the case of a promoted Sub-

Inspector or Sub-Inspectoress reverted him or her to his or her substantive rank. Any order for such extension of the probationary period or reversion or discharge shall indicate grounds on which the order is made. Such an order of extension shall not exceed the period of probation beyond one year in the case of a direct recruit and six months in the case of a promotee. For extension of any period beyond one year or six months, as the case may be sanction of Government shall be obtained."

10. In 1981 the West Bengal Services (Determination of Seniority) Rules were made and it not disputed before us that these rules are applicable to the Calcutta Police. Rule 3 (iv) defines "post"' "cadre" or "grade" as meaning any post, cadre or grade in connection with the affairs of the State of West Bengal. Rule 3(vi) says, "date of joining" shall be reckoned from the date of continuous officiation in a post/cadre or grade Rules 4, 5 and 6 which deal with "Determination of seniority of direct recruits," determination of seniority of promotees' and 'relative seniority of direct recruits and promotees' are important and have to be extracted in full. They are as follows :

"4. Determination of seniority of direct recruits.—The relative seniority of all persons appointed directly through competitive examination or interview or after training or otherwise shall be determined by the order of merit in which they are selected for such appointment on the recommendation of the Commission or other selection authority, persons appointed on the result of an earlier selection being senior to those appointed on the result of a subsequent selection :

Provided that where appointment of persons initially made otherwise than in accordance with the relevant recruitment rules is subsequently regularised in consultation with the Commission, where necessary, seniority of such persons shall be determined from the date of regularisation and not from the date of appointment. The inter seniority amongst such persons shall, however, depend on the date of each such person in the department or office concerned :

Provided further that if any person selected for appointment to any post does not join within two monts of the offer of appointment, his seniority shall count from the date on which he joins the post unless the appointing authority for reasons to be recorded in writing condones the delay.

Note—(1) A list of candidates for the purpose of selection for appointment shall be prepared in all casese by the selecting authority, when there will be recruitment in a single process of selection of more than one person.

(2) Where the inter se seniority amongst several persons has not been determined prior to the coming into force of these rules, such seniority shall on the coming into force of these rules, be determined on the basis of actual date of their joining. When the date of joining of all such persons is the same, seniority shall be determined on the basis of date of birth, person retiring

earlier being adjudged as senior. When the date of birth is the seme saniority shall be determined on the basis of total marks obtained by each in the examination, passing of which is the qualification prescribed for recruitment to the particular cadre or grade.

(3) In so far as the determination of relative seniority of persons selected either by the Commission or by other selecting authority for appointment to different posts in the same grade with different qualifications such as posts of Assistant Professors in History, Economics, Physics Chemistry, etc., is concerned, seniority shall be determined from the date of joining.

5. Determination of seniority of promotees—(1) Seniority of person appointed on promotion to any post, cadre or grade shall be determined from the date of joining such post, cadre or grade.

(2) When there will be appointment in a single process of selection of more than one person, the relative seniority of persons so appointed shall be determined by the order in which they are selected for such promotion.

(3) Persons appointed on the result of an earlier selection shall be senior to those appointed on the results of a subsequent selection.

(4) Where promotions to a post, cadre or grade are made from more than one post, cadre or grade, the relative seniority of the promotees from different posts, cadres or grades shall be eccording to the order of merit determined by the Commission or the selecting authority, if such posts, cadres or grades do not eome within the purview of the Commission.

Note 1—A list of candidates for the purpose of selection for promotion shall be prepared in all cases by the selecting authority when appointments are made on promotion in a single process of selection of more than one person.

Note 2—Where the inter se seniority amongst several persons has not been determined prior to the coming into force of these rules, such seniority shall, on the coming into force of these rules, be determined on the basis of date of joining. When the date of joining of such person is the same, seniority in the promotion post, cadre or grade shall follow the seniority in the lower feeder post, cadre or grade.

6. Relative seniority of direct recruits and promotees—(1) The relative seniority between a promotee and a direct recruit shall be determined by the year of appointment or promotion of each in the post, cadre or grade irrespective of the date of joining.

(2) The promotees shall be en-bloc senior to the direct recruits of the same year.

11. A certain amount of confusion has been created by the reliance placed by the High Court upon the decisions of this court in Ganga Ram v. Union of India. (1970) 3 SCR 481 and Katyani Dayal v. Union of India (1980) 3 SCR 139. We wish to make it clear,

straightway, that neither of these cases has any application to the facts of this case, as we shall presently explain.

12. The proposition is now undisputed, and, indeed none of the Counsel who appeared before us disputed it, that in the absence of Rules to the contrary regulating the question of seniority between 'direct-recruits' and the 'promotees, the general principle to be implide and followed to determine seniority is to base it on continuous officiation in non-fortuitous vacancies. In the care of S.B. Patwardhan v. State of Maharashtra (1977) 3 SCR 775, Chandrachud, C.J. observed:

> "We however, hope that the Government will bear in mind the basic principle that if a cadre consists of both permanent and temporary employees, the accident of confirmation cannot be an intelligigible criterion for determining seniority as between 'direct-arecruits' and the 'promtees'. All other factors being equal continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from differnt sources, so long as they belong to the same cadre, discharge similar functions and bear the similar responsibilities'.

13. In Baleshwar Dass v. State of U.S. (1981) 1 SCR 449, Krishna Iyer, J. to observe had occaserve:

> "We must emphasise that while temporary and permanent posts have great relevancy in regard to the career of Government servants, keeping posts temporary for long, sometimes by annual renewal for several years, and denying the claims of the incumbents on the score that their posts are temporary makes no sense and strikes us as arbitrary, especially when both temporary and permanent appointees are functionally identified. If, in the normal corse, a post is temporary in the real sense and the appointee knows that his tenure cannot exceed the post in longevity, there cannot be anything unfair or capricious in clothing him with no rights. Not so, if the post is, for certain departmental or like purposes, declared temporary but it is within the ken of both the Government and the appointee that the temporary posts are virtually long-lived. It is irrational to reject the claim of the 'temporary' appointed on the nominal score of the terminology of the post. We must also express emphatically that the principle which has received the sanction of this Court's pronouncements is that officiating service in a post is for all practical purposes of seniority as good as service on a regular basis. It may be xermissible, within limits, for Government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules in that regard are clear and categorical and do not admit of any ambiguity and cruelly arbitrary cut-off long years of service does not take place or there is functionally and qualitatively, substantial difference in the service rendered in the two types of posts. While rules regulating conditions of service are within the executive

ower of the State or its legislative ower under proviso to Article 309, even , such rules have to be reasnable, fair nd not grossly unjust if they are to rvive the test of Arts. 74 and 16."

14. To the same effect in A. nardhana v. Union of India (1983) 3 CC 601, D.A. Desai, J. observed:

"In other words, after having endered service in a post included in ne service, is hanging outside the ervice without finding a berth in service hereas direct recruits of 1976 have ound their place and berth in the ervice. This is the situation that stares to one's face while interpreting the uota-rota rule and its impact on the ervice of an individual. But avoiding ny humanitarian approach to the roblem, we shall strictly go by the elevant Rules and precedents and the npact of the Rules on the members of ne service and determine whether the npugned seniority list is valid or not- ut, having done that we do propose to xamine and expose an extremely ndesirable, unjust and inequitable tuation emerging in service, urisprudence from the precedents namly, that a person already rendering serice as a promotee has to go down beow a person who comes into service ecades after the promotee enters the ervice and who may be a schoolian if ot in embryo, when the promotee on eing promoted on account of the exigecies of service as required by the Govrnment stated rendering service. A ime has come to recast service jurispruence on more just and equitable foundation by examinig all precedents on the subject to retrieve this situation."

15. These cases were quoted with approval by Chandrachud, C.J. and one of us (Pathak,J.) in G.P. Singla v. Union of India, AIR 1984 SC 1595. In that case as a result of the application of Rules 16 and 17 of Delhi Higher Judicial Service Rules, the 'quota and rota' Rule ceased to apply and the question arose what was the criterion to be adopted to determine the seniority between 'direct recruits' and 'promotees'. Chandrachud, C. J. and Pathak, J. observed:

"Sinc the rule of 'quota and rota' ceases to apply when appointments are made under Rr 16 and 17, the seniority of direct recruits and promotees appointed under those Rules must be determined according to the dates on which direct recruits were appointed to their respective posts and the dates from which the promotees have been officiating continuously either in temporary posts created in the service or in substantive vacancies to which they were appointed in a temporary capacity."

16. G S. Lamba v. Union of India (AIR 1685 SC 1019) there was a breakdown of the 'quota-rota' Rule as it had not been followed. The problem was seniority to be determined between direct-recruits and promotees, D. A. Desai, J. with whom Khalid, J. agreed after noticing the decisions in B.S. Gupta v. Union of India, 1975 Suppl SCR 491 A. K. Subramana v Union of India (1975) 2 SCR 979 P.S. Mahal v. Union of India, Jnnardhana v. Union of India (AIR 1983 SC 769), O P. Singla v. Uni-

on of India observed:

> "In the absence of any other valid principle of seniority it is well-established that the continuous officiation in the cadre, grade or service will provide a valid principle of seniority. The seniority lists having not been prepared on this principle are liable to be quashed and set aside."

17. We may now refer to the two decisions of this court upon which reliance was placed by the High Court. In Ganga Ram v. Union of India the question arose with regard to the validity of a provision of the Indian Railways Establishment Manual according to which amongst Clerks Grade I who had been promoted from the rank of Clerks Grade II after passing the prescribed qualifying examination, those who had been promoted earlier because they had passed the examination earlier, were, nevertheless required to take their place in the seniority list after those who were promoted later because they had passed the examination later if the letter happened to be senior in Grade II. In other words notwithstanding their actual dates of commencement of continuous officiation, promotees to Grade I carried with them their seniority in Grade II. The Rule was challenged on the ground of discrimination. It was said that in the case of direct recruits to Grade I seniority was reckoned from the date of appointment to Grade I whereas in the case of promotees amongst themselves their seniority was based on their seniority in Grade II. This argument was repelled by this court on the ground that direct recruits and promotees constituted different classes and the classification was sustainable. It was said that promotion to Grade I was guided by the consideration of seniority-cum-merit and it was, therefore, difficult to find fault with the provision which placed in on group all those Grade II clerks who had qualified by passing the examination. The fact that the promotees from Grade II who had officiated for some time were not given the credit of that period when a permanent vacancy arose also did not attract the prohibition contained in Arts. 14 and 16. It did not constitute any hostile discrimination and was neither arbitrary nor unreasonable. It applied uniformly to all Grade II clerks who had qualified and become eligible. The onus, it was said, was on the petitioners to establish discrimination. The difference emphasised on behalf of the petitioners, it was finally observed, was too tenuous to form the basis of a serious argument. It will be seen that the case was not concerned at all with the rival claims of direct recruits and promotees but with the different treatment given to promotees as between themselves. The comparison with direct recruits was only for the purpose of advancing the claim that since amongst direct recruits seniority was reckoned in a particular way, there was no reason why the same principle should not be adopted in the case of promotees also instead of the principle of basing seniority in Grade I on seniorty in Grade II. We do not think that

this case is of any avail to the direct recruits in the present case.

18 In Katyani Dayal v. Union of India (1980 (3) SCR 139), in order to meet some special requirements of new situations created by new projects, some new posts of Temporary Assistant Officers, were created under a special scheme. These Temporary Assistant Officers belonged neither to class I nor to class II service, though on completion of three years service it was declared that they could be considered for absorption in Class I Junior Scale. The Temporary Assistant Officers filed a writ petition claiming that they were appointed to the Indian Railway Service of Engineers Class I right from the beginning and that the Railway Board was wrong in treating them as belonging to neither Class I nor Class II The court held that the service comprising the Temporary Assistant Officers and the Indian Railway Service of Engineers Class I started separately and never became one. The objects of their recruitment were dissimilar and the appointing was not the same. The training that was imparted was also unlike. The very tenure of the Temporary Assistant Officers was precarious and their immediate aspiration was only to be absorbed into the Indian Railway Service of Engineers Class I. These distinctive features marked out the Temporary Assistant Officers as a Class apart from the Indian Railway Service of Engineers class I and therefore was no question of entitlement of equal rights with the latter. Of course, once they were absorbed into the Indian Railway Service of Engineers they would be entitled not to be treated differently thereafter Their seniority would ordinarily be reckoned from the date of their absorption into the Railway Service of Engineers as promised in their letters appointment. It was further pointed out that there was a fundamental qualitative, difference, linked with the method of recruitment. Though the minimum educational qualification was the same, those who were recruited directly to the Indian Railway Service of Engineers Class I were subjected to stiff and competitive, written and personality tests Only the very best could aspire to come out successful. The Temporary Assistant Officers were not subjected either to a written test or to a personality test but were selected on the basis of an interview by the Union Public Service Commission. In addition to the minimum educational qualification, three years' experience as a Civil Engineer was also prescribed. Thus while brilliance was the beacon light which beckoned those aspiring to become members of the Indian Railway Service of Engineers Class I, it was replaced by experience in the case of those wanting to be Temporary Assistant Officers. Again the appointing authority in the case of Indian Railway Service of Engineers Class I was the President while the appointing authority in the case of Temporary Assistant Officers was the Railway Board, no doubt, pursuant to the authority given

by the President. Different courses of training were prescribed for the Indian Railway Service of Engineers and the Temporary Assistant Officers. For the Indian Railway Service of Engineers the training was an intensive and comprehensive one designed to equip them for higher posts in the Department too; while the training for Temporary Assistant Engineers was a brief six months' training intended merely equip them for carrying out the specific jobs. In the matter of terms and conditions of service, while the provisions of the Indian Railway Establishment Code were fully applicable to the Indian Railway Service of Engineers Class I those provisions were applicable to 'Temporary Assistant Officers' to the extent there was no specific provision in their letter of appointment and agreement.

19. It was on those facts and circumstances that it was held that there was no discrimination directed against the Temporary Assistant Officers. We are unable to see how this case can possibly help the direct recruits in the present case. It was suggested that the officiating Sub-Inspectors of Police who had been promoted from the rank of Assistant Sub-Inspectors were appointed to posts outside the cadre as in Katyani Dayal's case and it was this argument that found favour with the High Court. There is no basis whatsoever for the supposition that there was any new cadre or any new class of posts created by the Government, known as Officiating Sub-Inspector of Police. The Officiating Sub-Inspectors of Police were obviously appointed to officiate in permanent or temporary vacancies in the existing subordinate ranks of the Calcutta Police, governed by the same Rules and Regulations as other Sub-Inspectors of Police, drawing the same pay and discharging the same duties. There was not and there could never be any question of Officiating Sub-Inspectors constituting a different cadre, class or category by themselves.

20. The next question is whether the Rules regulating the recruitment, seniority etc. of Sub-Inspectors of Police in the Calcutta Police make any departure from the general principle laid down in the whole series of cases commencing with Patwardhan to which we have already referred. Earlier we have set out in great detail all the relevant rules in force from time to time. We do not find anything in any of the rules indicating an intention to department from the general principle. Shri S. N. Kacker, learned counsel for the direct recruits invited our attention to Rule 6 of the West Bengal Services (Determination of Seniority) Rules, 1881 and asked us to read it in the light of Rule 3 (vi) which defines 'date of joining' and stipulates that date of joining shall be reckoned from the date of continuous officiation in a post/cadre or grade. Rule 6 (i) provides that relative seniority between a promotee and a direct recruit shall be determined by the year of appointment or promotion of each in the post, cadre or grade irrespective of the date of joining and Rule 6 (2) provides that the promotees shall be

n bloc senior to the direct recruits of
he same year. The submission of Shri
acker was that 'date of joining' as
efined in Rule 3 (vi) was expressly
ade irrelevant by Rule 6 (1) for the
urpose of determining seniority be-
ween a promotee and a direct recruit
nd it meant that the period of contin-
ous officiation was not to be taken into
ccount in determining relative senior-
y between promotees and direct recr-
its. The argument though superfici-
lly attractive lacks substance. A per-
sal of Rules 4 and 5 makes the positi-
n clear. Rule 4, 5 and 6 constitute a
ngle scheme. Now Rule 4 which deals
ith seniority amongst direct recruits,
roadly, provides that their relative sen-
rity shall be according to the cadre of
erit when they are selected at the
ame examination, persons appointed
n the basis of an earlier examination
king precedence over those appointed
n the basis of a later examination.
ule 4 further provides that where sen-
rity has not been previously determ-
ed it shall be determined according to
e actual date of joining. Rule
deals with determination
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n appointed to any post, cadre or
rade shall be determined from the
ate of joining such post, cadre or
rade, which we know from Rule 3
i) means the date of continuous
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hen comes Rule 6 which prescribes
at the relative seniority between a
romotee and a direct recruit shall

be determined by the year of appointment or promotion of each in the post, cadre or grade irrespective of the date of joining and that the promotees shall be en bloc senior to the direct recruits of the same year. Now, if Rules 4, and 6 are read together the scheme becomes clear. While date of joining is important to decide, the question of seniority amongst promotees, it is the year of joining that is relevant when the question of relative seniority is to be determinated between promotees and direct recruits. If direct recruits are appointed and promotees are promoted in the same year, all promotees are to take precedence over the direct recruits, irrespective of the actual date of their joining but as amongst the promotees themselves, the senority is to be based on the date of joining. That according to us is the true and appropriate construction of Rules 4, 5 and 6. We are indeed very happy to note that this is precisely what the West Bengal Government wanted to do and it was done with a view to give effect to the judgments of this Court. Paragraph 5 (II) of the affidavit of Nirupom Som, Commissioner of Police, Calcutta, is worth extracting and it is as follows :—

"5(I) ...."

"1(II) (a) With effect from 11-3-81 the West Bengal Services (Determination of Seniority) Rules, 1981 were promulgated under Article 209 of the Constitution. These rules were made following the judgment of the Hon'ble Supreme Court in the Patwardhan v. State of Maharashtra case. Previously laid down in the Finance Department Memo No. 568-F dated 20-2-68. Prior to 20-2-68, there were no codified principles, the respective Departments following principles that might be different in different departments."

"(b) The Hon'ble Supreme Court made observation, inter alia as follows in the aforesaid case :-

(i) The vice of the seniority rule (which determines seniority between direct recruits and promotees from the date of confirmation) that it leaves the valuable right of seniority to depend upon the more accident of confirmation. That under Articles 14 and 16 of the Constitution is impermissible and therefore, we must strike down the said rule as being unconstitutional."

'(ii) We do not want to take upon ourselves the task of framing rules of seniority. That is not the function of this Court and frankly it lacks the expertise and date to do so. We, however, hope that the Government will bear in mind the basic principles that if a cadre consists of both permanent and temporary employees, the accident of confirmation cannot be an intelligible criterion for determining seniority as between direct recruits and promotees. All other factors being equal continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from different sources, so long as they belong to the same cadres discharge similar functions and bear similar responsibilities."

"(c) In the light of the aforesaid observations of the Hon'ble Supreme Court the provisions in Finance Department Memo No. 568-F dated 20-2-68 were examined in consultation with the law officers of Government and the Public Commission. The West Bengal Service Determination of Seniority) Rules, 1981 were promulgated with effect from 11-3-81 after due observance of all formalities and considering all aspects of the matter."

Again in Paragraph 10 it was said,

"10.........I submit that in the instant case it can hardly be disputed that both the direct recruits as well as the promotees Sub-Inspectors of Police form one class. They are both known by the same designation, they have the same scales or pay, they discharge the same functions, and the posts held by them are interchangeable. Thus there is nothing to show that the two groups are kept apart, and both are merged together in the same class. It is not competent to the Government thereafter to discriminate between directly recruited Sub-Inspectors and promotee Sub-Inspectors in the matter of further promotion to the posts of Inspectors, as that would be violation of Article 16 of the Constitution. It is submitted that the rule of promotion is inextricably linked with the rule of weightage and seniority in the lower grade. There is a ell-recognised discrimination between romotion and confirmation and the sts to be applied for the purposes of romotion are entirely different from ose that had to be applied at the time f confirmation. Though drawn from vo different sources, the direct recruits nd promotees constitute in the nstant case a single integrated cadre. hey discharge identical functions, ear similar responsibilities and ac- uire an equal amount of experience in eir respective assignmens. The super- eded principles for Determination of eniority denied to the promotees the enefit of their long and valuable xperience. If there were some intellig- ble grounds for this differentiation aving nexus with efficiencies in ublic services, it might perhaps have een possible to sustain such a classifi- ation. Confirmation is one of the nglorious uncertainties of Government ervice depending within an (neither on?) fficiency of the incumbent on the vailability of substantive vacancies. he vice of the seniority rule (which etermines seniority between direct ecruits and promotees) from the date f confirmation is that it leaves the aluable right of seniority to depend pon the mere accident of confirmation. hat under Articles 14 and 16 of the Constitution, is impermissible. If a adre consists of both permanent nd temporary employees, the accident ontrmation cannot be an intelligible riterion for determing Seniority as etween direct recruits and promotees. All other facts being equal, continuous fficiating in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from different sources, so long as they belong to the cadre same, discharge similar functions and bear similar responsibilities."

We think it is needless to further dilate on this topic except to express our appreciation of the stand taken by the West Bengal Government in these paragraphs.

21. The final submission of Mr. Kacker was that the appellants had never appeared at the prescribed examination, had, never been called before the Selection Board and had never been sent to the Police Training College. They had never gone through the selection process prescribed by the Rules and could not therefore have been validly appointed as officiating Sub-Inpsectors of Police or cofirmed as Sub-Inspectors of Police. The appellants, at least, two of them have been officiating as Sub-Inspectors of Police since almost three decades and even confirmed as Sub-Inspectors of Police for a decade. We are afraid it is rather late in the day for Mr. Kacher to raise this question at almost the final stages of a long drawn out battle. It is true that in their writ petition in the High Court, the appellants made the barest of allegations in regard to their process of selection which they went through before they were promoted to the rank of Sub-Inspectors of Police. They had said,

"After passing the departmental examination for promotion to the rank of Sub-Inspector, your petitioners were declared fit for promotion to the rank of Sub-Inspectors and your petitioners Nos 1 and 2 were promoted to the rank of Sub-Inspectors on the 6th August, 1957 while your petitioner No. 1 was promoted to the rank of Sub-Inspector on the 8th September, 1975." Even this bare allegation was not properly denied in the counter filed by the respondents and that was never seriously put in issue. At the conclusion of the hearing we called upon the State of West Bengal to produce all the relevant records pertaining to the service carees of the three appellants but we do not propose to wait for them. Enough for us to do justice as it appears from the records now before, us. We think that the three appellants are entitled to have the benefit of their continuous officiating service as Sub-Inspectors of Police counted for seniority as Sub-Inspectors of Police. A writ will, therefore, issue directing the respondents to re-fix the seniority of the appellants and other officers similarly situated in accordance with what we have said above.

22. A further question was raised by the appellants regarding the validity of the Paragraph 1 (iii) of the Police Regulations, Calcutta, 1967 which provides that directly recruited Sub-Inspectors shall be eligible to sit for the depatmental examination to qualify themselves for promotion after their confirmation and on completion of 7 years' service, including temporary service in their rank. On the other hand, they
complain that the rule provides th
departmental Sub-Inspectors who ha
been so appointed by promotion sh
be eligible to sit for the examinati
after their confirmation in the ra
of Sub-Inspectors provided that th
total length of service as Sub-Inspect
is not less than 7 years. Seeming
the rule appears to treat both the dir
recruits and promotees on the sa
footing, but it was submitted by t
learned counsel for the petitioners th
in practice the rule works harshly
the promotees because of the ingnoriou
uncertainty of the confirmation of t
promotees. It was said that the da
of confirmation of a promotee was
incurably uncertain, compelling a pr
motee to wait for more than a deca
for confirmation and thus he will n
be eligible to appear for the qualifyi
examination for promotion as Inspe
tor of Police even though he has con
pleted 7 years of continous officiatin
service as Sub-Inspector of Polic
There appears to be some legitima
scope for grievance on this questic
because of the vagaries of date of co
firmation of promotees. But we a
not inclined to examine this questic
in the present case as petitioners 1 ar
2 made no efforts to qualify themselv
for promotion by appearing in th
examination after their confirmatic
in 1975 even though they had alread
completed 7 years of service. In th
case of the 3rd petitioner, he had no
even completed 7 years, service by th
date of the filing of the writ petitio
and we are told that he had also no

O. Chinnappa Reddy
Judge
Supreme Court of India

retired from service. In the circumstances, we do not think it necessary to examine this question. The appeal is, therefore, allowed in the manner and to the extent indicated. Such other benefits to which the appellants are entitled under the judgment of the High Court will remain unaffected. The appellants will get their cost which we quantify to Rs. 5,000/-

Order accordingly.

Report No. 89, P. 20

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

D.A. Desai
Judge
Supreme Court of India

OBSERVATION

Reinstatement and entitlement of back salary—Suspension for criminal prosecu-on—Dismissal after conviction Reinstatement after acquittal in appeal—1/4th ılary withheld for suspension period—Suit for—Constitution of India, Art. 311.

OBSERVED BY

D.A. Desai, R.B. Misra and
Ranganath Misra,
Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 730 of 1978 decided on 29-11-1983, between Brahma handra Gupta Appellant v. Union of India, Respondent.

TEXT

Judgment : — This appeal by special ave arises from a judgment of the Iigh Court of Allahabad confirming ne decision of the District Judge in ppeal reversing the decree passed by ne trail Court in favour of the appe-ant.

2. Appellant was working as a ermanent Upper Division Clerk in ne Defence Accounts Department at ne relevant time. It appears that one athu Singh was wanted in a dacoity ıse. On 14-5-62 around about 4 00 ne Investigating Officer received an formation that Nathu Singh was pre-ent in the premises in possession of ne present appellant and this informa-on led to a search of the premises occu-ied by him. The search and the conse-ıent seizure led to the prosecution of ne appellant for two distinct offences, ne under Section 19(F) of the Indian Arms Act and another under Section 5 of the Indian Explosive Substances Act. Pending the investigation appellant was suspended from service with effect from May 14, 1962, the order having been passed on May 5, 1952. The order of suspension simultaneously provided that appellant-would be entitled to draw subsistence allowance equal to leave salary which he would have drawn had on leave on half pay together with admissible dearness allowance. Appellant was tried in the Court of the Magistrate, 1st Class, Shahjahanpur for the offence under S 19 (F) of the Indian Arms Act and was convicted and sentenced to suffer imprisonment for a period of one and half years as per the judgment dated September 15, 1964. The conviction led to the order dismissing the appellant from service effective from October 31, 1964. Appellant preferred an appeal against his conviction

and sentence. The appeal was allowed as per the judgment dated October 31, 1964 and appellant was held not guilty of the offence with which he was charged and he was acquitted. On being acquitted the appellant was reinstated in service effective from September 3, 1965 While ordering reinstatement in service the concerned authority was required to decide how the period of suspension should be treated. The question was to be decided in light of the provision contained in Article 193 of the Civil Service Regulation. The concerned authority divided the period of suspension of the appellant into two parts, the first being from May 14, 1962 to October 31, 1964 when appellant was acquitted and the second being from October 31, 1964 to September 3, 1965 when he was reinstated in service. With regard to the latter part, the concerned authority directed the payment of full salary after giving credit for the suspension allowance that was drawn by him and there is no dispute between the parties about it. The question then remained with regared to the period from My 14, 1962 to October 31, 1964. For this period the concerned authority was of the opinion that the appellant could not be said to be fully exonerated and therefore, a direction was given that the appellant should be given 3/4th of his salary for the period of suspension. The consequence was that for the aforementioned period 1/4th of his salary was not paid to appellant. The appellant filed Suit No. 210 of 1968 in the Court of the 2nd Civil Judge, Kanpur against the Union of India contending that a he was never hauled up for departmental enquiry and he was suspended onl on the ground that a criminal charg was laid against him and pending th trial of the offence, and therefore Article 193 would not be attracted and accordingly it was not open to the authorit concerned to deny him full salary fo the period of suspension. Alternativel it was contended that in the circumstances of the case he was deemed to hav been fully exonerated and therefore als the order withholding 1/4th of the salary was not sustainable.

3. After all these elaborate pleadings and fifteen years of litigation th claim made in the suit was ridiculousl low in the amount of Rs. 3595.07 P.

4. The learned trial Judge accepted the case of the plaintiff-appellan and decreed the suit with costs. Surprisingly, though not unusual these days for this paltry sum the Union of Indi carried the matter in appeal We find it difficult to appreciate this litigious attitude against a clerk in lower echelon of service more so when no principle was involved. It may be that the Union of India wanted the Court to consider the true ambit and scope of Article 193 and therefore, the appeal may have been preferred. The learned District Judge was of the opinion that in the circumstances of the case the appellant could not be said to be fully exonerated and accordingly reversed the judgment and decree of the trial Court and dismissed the suit. After an unsuccessful appeal to the High Court, the appellant has

filed this appeal by special leave petition.

5. The appellant was suspended in 1962 and we are now in 1983 when the appellant prays for a decree for Rupees 3595.07 P. During the passage of the time the purchasing power of this amount must have been considerably reduced by now.

6. Mr. R.K. Garg, learned counsel for the appellant wanted us to examine the scope and ambit of Article 193 and Mr. Gujral learned counsel for the Union of India was equally keen on the other side to do the same thing. We steer clear of both. The appellant was a permanent UDC who has already retired on superannuation and must receive a measure of socio-economic justice. Keeping in view the facts of the case that the appellant was never hauled up for departmental enquiry, that he was prosecuted and has been ultimately acquitted, and on being aquitted, he was reinstated and was paid full salary for the period commencing from his acquittal, and further that even for the period in question the concerned authority has not held that the suspension was wholly justified because 3/4th of the salary is ordered to be paid, we are of the opinion that the approch of the trial Court was correct and unassailable. The learned trial Judge on appreciation of facts found that this is a case in which full amount of salary should have been paid to the appellant on his reinstatement for the entire period. We accept that as the correct approach. We accordingly allow this appeal, set aside the judgment of first appellate Court as well of the High Court and restore the one of trial Court with this modification that the amount decreed shall be paid with 9% interest p. a. from the date of suit till realisation with costs throughout.

Appeal allowed

IT IS THE ESSENCE OF DEMOCRACY
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NO MASTER BUT THE LAW

Report No. 91, p. 01

A. N. Sen
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Article 136—Airman employed in Air Force—On expiry of period of service of 9 years, filing an application for extension of term of service by another six years under relevant regulations—Authorities on the basis that applicant was accused in criminal case and was likely to be convicted of charge of theft passing an order of discharge considering him unsuitable —Applicant, however, acquitted of charge of theft subsequently—On facts of case, applicant-appellant, held, was entitled to be compensated by payment of lump sum amount in lieu of benefits to which he would have been entitled had he continued in service for extended period of 6 years.

OBSERVED BY

Amarendra Nath Sen and
Ranganath Misra,

Hon'ble Judges Supreme Court of India.

IN

Civil Appeal No. 727 of 1978, decided on 15-9-1983, between Sohan Singh, Appellant v Union of India another, Respondents.

TEXT

Amarendra Nath Sen, **J.** — The appellants was employed in the Air Force as an airman. On the expiry of the period of service of 9 years the appellant in terms of the relevant provisions of the regulation made an application for the term of his service being extended by another 6 years. Unfortunately for the appellant got involved in a criminal case in releation to theft of certain Mig Batteries. The authorities concerned after holding an enquiry decided to hand over the Case to the Municipal Court instead of trying the appellant by Court Martial. Before any order had been passed on the said application of the appellant for extension of his term the appellant continued in service for a further period of one year in view of the provisions of D I Rules. As the appellant happened to be an accused in the criminal case the authorites concerned on the basis that the appellant was an accused in a criminal case and was likely to be convicted of the charge of theft, discharged the appellant considering the appellant to be unsuitable by order dated 6-4-1973. The appellant was, however, actually discharged on 19-11-1973. Against this order of discharge the appellant filed a writ petition in the Delhi High Court which was dismissed by the Delhi High

Court and the appellat has preferred this appeal with leave granted by this Court. After the dismissal of the writ petition by the Delhi High Court the criminal case against the appellant was finally disposed of and the appellant was acquitted of the charge of theft on 8-11-1976·

2. We have heard the learned counsel for the parties. We have also carefully considered the materials which have been placed before us

3. It appears that on an earlier occasion when then the appeal came up for hearing the authorities had agreed in Court to delete from the order of discharge the words "unsuitable for retention in Air Force (on disciplinary grounds)" and had further agreed to pay to the appellant Service Gratuity and Death-cum-Retirement Gratuity admissible under Pension Regulations of the Air Force, 1961 Part I for the period of qualifying service in the Air Force up to the date of his discharge.

4. On a careful consideration of the materials we are satisfied that the order of discharge of the appellant was passed mainly on the ground that the criminal case against the appellant was pending and the authority concerned was of the opinion that the appellant was likely to be convicted in that particular case. The materials on record clearly indicate that the pendency of the criminal case against the appellant and the possibility of the appellant being convicted of the said charges had greatly weighed with the authority ar
had influenced its decision in directi
the discharge of the appellant. Tl
note of the Commanding Officer rec
mmending discharge on the ground th
the appellant was not suitable, recor
that, the appellant was likely to l
convicted'. We have no hesitation i
coming to the conclusion that if th
order of acquittal had been pronour
ced before the date of the order c
discharge of the appellant, the autl
ority concerned would have allowe
the application for extension of th
term of service of the appellant.
extension had been allowed as in th
normal course it would have bee
granted if the order of acquittal wer
there at the relevant time, the appel
lant would have been entitled to cor
tinue in service for a further perio
of six years in the usual course. Ou
of the said period of six years th
appellnat in view of the provision
of D.I. Rules had in fact serve
for a little over a year before he wa
actually discharged

5. It appears that after the dis
charge of the appellant the authori
ties concerned had given a certificat
of good conduct to the appellant
That certificate which is at p. 36 o
the paper book reads as follows :—

"This is to certify that 25190
Corporal (non-commissioned officer
Sohan Singh Fitter II Air Force ha
been serving in the Indian Air Force
Since October, 1963).

2. During his services he ha
been loyal and dutiful. He had prove

A. N .Sen
Judge
Supreme Court of India

himself a technician of high calibre. He has been assessed as Superior in his trade efficiency and very good character.

I wish him all success.

Sd/. (D. Keelor) Vr.C.
Wing Commander
Officer Commanding
No. 4 Squadron, A.F.

Dated September 19, 1973."

6. Taking into consideration the peculiar facts and circumstances of this case we are, therefore, of the opinion that the justice of the case requires that the appellant should be compensated by payment of a lump sum amount in lieu of the benefits to which he would have been otherwise entitled, if he had continued in service for the extended period of 6 years. However, without going into the merits of the actual claim of the appellant for this particular period we are of the opinion that the ends of justice will be sufficiently met if we direct the authorities concerned to pay to the appellant a sum of Rs. 35,000/- by way of compensation. This amount will be paid in addition to the amounts which are to be paid to the appellant by way of Service Gratuity and Death-cum-Retirement Gratuity. The amount will be paid to the appellant within one month from today. The authority concerned is further directed to delete from the order the words 'unsuitable for retention in Air Force (on disciplinary grounds)'.

7. The appeal is disposed of accordingly. There will be no order as to costs.

Appeal allowed.

IT IS THE ESSENCE OF DEMOCRACY
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E. S. Venkataramiah
Judge
Supreme Court of India

OBSERVATION

(A) Constitution of India, Arts. 311 and 309, proviso—Police Service (Recruitment) Rules (1954), Rule 9 (1)—Police Service (Appointment by Promotion) Regulations (1955), Regn. 4—Promotion to Indian Police Service Cadre—Case of employee not considered by Selection Committee for promotion due to adverse remarks—Adverse remarks not communicated to employee and subsequently expunged by State Government—Decision of Selection Committee vitiated—C.W.J C. No. 1420 of 1982, D/- 5-10-1982 (Pat). Reserved.

(B) Constitution of India, Article 311—Fntry of adverse remarks in confidential roll—Proper procedure—In order to avoid contingency of officer missing opportunities advancing his prospects in service due to present system of communicating adverse remarks after delay and consideration of representation against them some years later, two systems suggested—First is to make remarks in the roll in presence of officer concerned, with right to make representation to higher authorities and second is to serve copy of such remarks on the officer before submission of confidential roll.

OBSERVED BY

E. S. Venkataramiah and
R. B. Misra
Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 8491 of 1983, decided on 3-1-1984, between Amar Kant Choudhary, Appellant v. State of Bihar and others, Respondents.

TEXT

Venkataramiah, J. — This is an appeal by special leave against the order dated October 5, 1982 in C.W.J.C. No. 1420 of 1982 on the file of the High Court of Patna dismissing the petition filed by the appellant under Article 226 of the Constitution.

2 The facts of the case are these : The appellant was directly recruited and appointed as a Deputy Superintendent of Police in the Police Department of the State of Bihar in the year 1964. In 1973 he was eligible to be considered for appointment as a member of the Indian Police Service under the provisions of the Indian Police Service (Recruitment) Rules, 1954 (hereinafter referred to as 'the Rules') read with the Indian Police Service (Appointment by Promotion) Regulations, 1955 (hereinafter referred to as 'the Regulations') framed under sub-rule (1) of Rule 9 of the Rules. His case was

placed before the Committee constituted under Regulation 4 of the Regulations for the purpose of preparation of the list of suitable officers for promotion to the Indian Police Service Cadre of the State of Bihar in 1973, 1974, 1975 and 1976. In the years 1973, 1974 and 1975, he could not be included in the select list as he was junior to those who were included in the select list. In the year 1976 his name was not included in the select list as there was an adverse entry in his confidential roll of 1973-74 The reasons given by the Committee for superseding the appellant based on the confidential roll were these :

"Delayed disposal of pending papers and supervision notes. Inadequate control over office, judgment, initiative, sense of responsibility and management reported to be just fair. Censured by State Government order dated 20th October, 1975".

3. The Selection Committee took the decision to supersede the appellant at its meeting held on December 22, 1976 in view of the above entry in the confidential roll of the appellant. It is not disputed that the said adverse entry was communicated to the appellant in the year 1977 after the above meeting was over. It appears that there were also adverse entries in the annual confidential roll of the appellant for the year 1974-75. They were communicated to the appellant in the year 1976. The appellant made representations in respect of both the adverse entries in time. His main grievance was that they had been made by his official superior who was biased against him. The adverse entry made in the confidential roll for the year 1973-74 was expunged by the State Government on December 3, 1980 and the adverse entries in the confidential roll for the year 1974-75 were expunged by two orders dated February 21, 1978 and October 7, 1980, There was no meeting of the Selection Committee from 1977 to 1980. It, however, met on March 11/12, 1981 On this occasion the appellant represented to the Committee that the adverse entries in his confidential rolls had been removed by the State Government by various orders and requested them to consider his case for promotion to the Indian Police Service Cadre. On this occasion the Committee did not look into the confidential rolls of the appellant for the years 1979-80 and 1980-81 which contained entries very favourable to the appellant for no fault of the appellant. The Committee, however, classified him as 'good' but did not include him in the select list while some of his juniors were included. The appellant represented to the Committee against the decision taken by the Committee. The Committee again met on October 14, 1981. When nothing came out of the representations made by him, the appellant filed a writ petitio questioning the validity of the decisions of the Selection Committee before the High Court of Patna. The petition was dismissed at the stage of admission. This appeal is filed by special leave against the order of the High Court.

4. The main point urged before us is that the Selection Committee had

committed an illegality in rejecting the claim of the appellant for being included in the select list in the year 1976 by relying upon the adverse entries which had deen made in his confidential rolls which had not been either communicated to him or against which he had made representation which had remained undisposed of and which had been subsequently expunged.

5. The true legal position governing such cases is laid down by this Court in Gurdial Singh Fijji v. State of Punjab, (1979) 3 SCR 513, which was a case arising under the Indian Administrative Service (Appointment by Promotion) Regulations, 1955 which more or less correspond to the Regulations applicable to the Indian Police Service. In the above case Chandrachud C.J. has odserved thus:

"The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumsances leading to the report. Such an opportunity is not an empty formality, its object, partially; being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether adverse report is justified. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the abverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified. In these circumstances it is difficult to support the non-issuance of the integrity certificate to the appellant. The chain of reaction began with the adverse report and the infirmity in the link of causation is that no one has yet decided whether that report was justified. We cannot speculate, in the absence of a proper pleading, whether the appellant was not found suitable otherwise, that is to say, for reasons other than those connected with the non-issuancee of an integrity certificate to him."

6. It is not disputed that the classification of officers whose cases are taken up for consideration into 'outstanding' 'very good', 'good' or 'bad' etc., for purposes of promotion to the Indian Police Service Cadre is mainly based upon the remarks in the confidential rolls. On December 22, 1976, when the Selection Committee met the adverse remarks in the confidential roll for 1973-74 had not been communicated and the appellant's respresentation regarding adverse remarks in the confidential roll for the year 1974-75 and censure against him had not been disposed of although it is alleged that one Shri Yamuna Ram against whom also adverse remarks had been made was included provisionally in the select list. When the Selection Committee met on March 11 and 12, 1981 despite State Government's suo motu decision not to retain adverse remarks for the

year 1976-77 on records, the same had not been removed from the confidential roll. This must have influenced the decision of the Selection Committee. It is also seen that the confidential rolls of the appellant for the years 1979-80 and 1980-81 which contained entries favourable to the appellant were not placed before the Selection Committee. On October 14, 1981 when Selection Committee met, it does not appear to have considered the representation made by the appellant against his non-selection. In addition to all these, the State Government has expunged the adverse remarks by its orders made from time to time. These facts are not controverted by the respondents.

7. The facts of this case are distinguishable from the facts involved in the decision of this Court in R.L. Butail v. Union of India, (1971) 2 SCR 55 which is relied on by the respondents. In that case the confidential report of the appellant therein for the year 1964 contained an adverse entry and he had made a representation regarding it. When the Departmental Promotion Committee met in March, 1966 the appellant's representation regarding the adverse entry of 1964 was not placed before it and a decision adverse to the appellant was taken by the Committee without reference to the said representation. The appellant contended before this court that the omission to consider his representation before the date of meeting of the Committee vitiated its decision. The Court held that the omission either to place the said representation before the Committee or its non-consideration before the date of the meeting had no effect on the decision of the Committee as the representation had actually been rejected subsequently with the result that the confidential report for the year 1964, remained unchanged. The position in the case before us is different. Here the adverse entries in question have in fact been expunged by the State Government subsequently. It may be pertinent to state here that the practice of the Departmental Promotion Committee referred to in Butail's case (supra) was that if in such a case a representation were to be accepted and in consequence the confidential report was altered or the adverse entries were expunged the Committee would have to review its recommendations in the light of such a result. The appellant in the present case has pressed before us for a similar relief as the adverse entries made against him have been since expunged.

8. After giving our anxious consideration to the uncontroverted material placed before us we have reached the conclusion that the case of the appellant for promotion to the Indian Police Service Cadre has not been considered by the Committee in a just and fair way and his case has been disposed of contrary to the principles laid down in Gurdial Singh Fijji's case (AIR 1979 SC 1622) (supra). The decisions of the Selection Committee recorded at its meetings in which the case of the appellant was considered are vitiated by reason of reliance being placed on the adverse remarks

which were later on expunged. The High Court committed an error in dismissing the petition of the appellant and its order is, therefore, liable to be set aside. We accordingly set aside the order of the High Court. We hold that the appellant has made out a case for reconsideration of the question of his promotion to the Indian Police Service Cadre of the State of Bihar as on December 22, 1976 and if he is not selected as on that date for being considered again as on March 12, 1931. If he is not selected as on March 12, 1981 his case has to be considered as on October 14, 1981. The Selection Committee has now reconsider the case of the appellant accordingly after taking into consideration the orders passed by the State Government subsequently on any adverse entry that may have been made earlier and any other of similar nature pertaining to the service of the appellant. If on such consideration the appellant is selected he shall be entitled to the seniority and allother consequential benefits flowing therefrom. We issue a direction to the respondents to consider the case of the appellant as stated above. We hope that the above direction will be complied with expeditiously but not later than four months from today.

9. Before concluding we wish to state that the Central Government and the State Governments should now examine whether the present system of maintenance of confidential rolls should be continued. Under the present system, entries are made in the confidential roll of an officer behind his back and then he is given an opportunity to make a representation against any entry that may have been made against him by communicating the adverse entry after considerable delay. Any representation made by him would be considered by a higher authority or the State Government or the Central Government as the case may be, some years later, as it has happended in this case, by which time any evidence that may be there to show that the entries made were baseless may have vanished. The predicament in which the officer against whom adverse remarks are made is then placed can easily be visualised. Even the authority which has got to pass orders on the representation of the officer will find it difficult to deal with the matter satisfactorily after a long interval of time. In the meanwhile the officer concerned would have missed many opportunities which would have advanced his prospects in the service. In order to avoid such a contingency, the Government may consider the introduction of a system in which the officer who has to make entries in the confidential roll may be required to record his remarks in the presence of the officer against whom after giving him an opportunity to explain any circumstance that may appear to be against him with the right to make representation to higher authorities against any adverse remarks This course may obviate many times totally baseless remarks being made in the confidential roll and would mini-

E. S. Venkataramiah
Judge
Supreme Court of India

mise the unnecessary suffering to which the officer concerned will be exposed. Another system which may be introduced is to ask the officer who records the confidential remarks to serve a copy of such remarks on the officer concerned before the confidential roll is submitted to the higher authorities so that his representation against the remarks may also reach the higher authority shortly after the confidential roll is received. This would curtail the delay in taking action on the representation. Suspensions, adverse remarks in confidential rolls and frequent transfers from one place to another are ordered or made many a time without justification and without giving a reasonable opportunity to the officer concerned and such actions surely result
in the demoralisntion of the service
Courts can give very little relief in suc
cases. The Executive itself shoul
therefore, devise effective means t
mitigate the hardship caused to the ofi
cers who are subjected to such trea
ment. These questions require to b
examined afresh in the light of the ex
perience gained in recent years and sc
lutions should be found to eliminat
as far as possible complaints agains
misuse of these powers by official sup
eriors who may not be well dispose
towards the officer against whom suc
action is taken. It is needless to stat
that a non-disgruntled bureaucracy add
to the efficiency of administration.

10. The appeal is accordingly al
owed with costs.

Appeal allowed

S. M. Fazal Ali
Judge
Supreme Court of India

OBSERVATION

(A) Departmental enquiry--Employee acquitted in criminal case—Enquiry whethere can be continued—Constitution of India, Article 311

(B) City of Nagpur Corporation Act (2 of 1950), Section 59 (3) (b)--Special functions of Chief Executive Officer—Expression 'control'—Connotation of—Suspension of Municipal employees pending departmental enquiry—Munibipal Commissioner is competent. Spl Civil Appln. No. 1501 of 1977, D/- 3-10-1979 (Bom) Reserved. (Words and phrases—Control).

OBSERVED BY

S. Murtaza Fazal Ali
A. Varadarajan and
V. B. Eradi,

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 396 of 1980, decided on 26-2-1981, between Corporation of the city of Nagpur, Civil Lines, Nagpur and another, Appellants v. Ramchandra G. Modak and others, Respondents.

TEXT

Fazal Ali, J. :—This appeal by special leave is directed against an order of the High Court of Bombay of 2/3rd October, 1979 by which an order passed suspending the two respondents was quashed on the ground that the order of suspension pending a departmental inquiry was passed by the Municipal Commissioner who was not competent to suspend the respondents pending a departmental inquiry. The High Court was of the view that under the Rules and Bye-laws of the City of Nagpur Corporation Act 1948 (hereinafter referred to as the 'Act') as amended up-to-date, the competent authority to pass order of suspension against the respondents was the Corporation itself and not the Chief Executive Officer. It appears that originally the order of suspension was passed by the Municipal Commissioner or the 23rd September, 1974 which was confirmed by the Corporation by its order dated 23rd September, 1974. It is alleged by the respondents that letter order was not communicated to them. The suspension was ordered in connection with a departmental inquiry relating to two accidents which occurred during the construction of a stadium called the Yeshwant Stadium, which was being looked after by the respondents and which resulted in the death of seven persons and injuries to eight others. A complaint was also filed before the police as a result of which a charge-sheet under Section 304-A IPC was filed against the respondents, on the 25th September, 1976. In view of the charge-sheet submitted by the police an other order of suspension was passed by the Municipal Commissioner on 13-1-77 with effect from 8-10-76. The respondents filed an appeal to departmental appellant authority which was dismissed on the 20th July, 1977. Thereafter, the respondents filed a writ petition in the High Court which allowed the petition and quashed the order of suspension and directed the respondents to be paid their full salary and further directed the re-instatement of the respondents. Hence this appeal.

2. The short point taken by Mr. Sanghi was that under Section 59(3) of the Act, the Municipal Commissioner is the competent authority to suspend the respondents pending a departmental inquiry. On a perusal of Section 59 (3) we are of the opinion that the contention is well founded and must prevail. Section 59 (3) may be extracted thus :

“Section 59 (3) : Subject, whenever it is in this Act exprssly so directed the approval or sanction of the Corporation or of the Standing Committee, and subject also to all other restrictions, limitations and conditions imposed by this Act, the entire executive power for the purpose of carrying out the provisions of this Act vests in the Commissioner who shall also—

(a) … … … … …

(b) exercise supervision and control over the acts and proceedings of a municipal officers and servants, and subject to the rules or bye-laws for the tim being in force, dispose of all question relating to the services of the said officers and servants and their pay, privileges and allowances.”

3. Thus Clause (b) of Section 5 (3) in express terms authorises and clothes the Municipal Commissioner wit the power to exercise supervision an control over the acts of Municipal officers and servants. It may be notice that the said Clause (b) is preceded b the words ‘vests in the Commissioner’ When the words ‘control’ and ‘vests’ ar read together they are strong term which convey an absolute control in th authority in order to effectuate th policy underlying the rules and make the authority concerned the sole custodian of the control of the servants and officers of the Municipal Corporation In the case of State of West Bengal v Nripendra Nath Bagchi, (1966) 1 SCR 771 while interpreting a similar language employed in Article 235 of the Constitution of India which confers control by the High Court over District Courts, this Court held that the word ‘control’ would include the power to take disciplinary action and all other incidental or consequential steps to effectuate this end and made the following observations

“The word “cotrol”, as we have seen, was used for the first time in the Constitution and it is accompanied by the word ‘vest’ which is a strong word.

It shows that the High Court is made the sole custodian of the Control over the judiciary. Control, therefore, is not merely the power to arrange the day to day working of the court but contemplates disciplinary jurisdiction over the presiding Judge."

"In our judgment, the control which is vested in the High Court is a complete control subject only to the power of the Governor in the matter of appointment (including dismissal and removal) and posting and promotion of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal ...."

This view was reiterated in Chief Justice of High Court of Andhra Pradesh v V. V. S. Krishnamurthy. (1979) 1 SCR 26. Where this Court clearly held that 'control' included the passing of an order of suspension and that the power of control was comprehensive and effective in operation. In this connection, Sarkaria, J. speaking for the Court, observed as follows :—

"The interpretation and scope of Article 235 has been the subject of several decisions of this Court. The position crystallised by these decisions is that the control over the subordinate judiciary vested in the High Court under Art. 235 is exclusive in nature, comprehensive in extent and effective in operation. It comprehends a wide variety of matters. Among others, it includes:

(a) (i) Disciplinary Jurisdiction and a complete control subject only to the power of the Governor in the matter of appointment, dismissal, removal, reduction in rank of District Judges, and initial posting and promotion to the cadre of District Judges. In the exercise of this control, the High Court can hold inquiries against a member of the subordinate judiciary, impose punishment other than dismissal or removal......... .

(ii) In Article 235, the word 'control' is accompanied by the works "vest" which shows that the High Court alone is made the sole custodian of the control over the judiciary. The control vested in the High Court, being exclusive, and not dual, an inquiry into the conduct of a member of judiciary can be held by the High Court alone and no other authority.

(iii) Suspension from service of a member of the judiciary with a view to hold a disciplinary inquiry."

4. It is thus now settled by this Court that the term 'control' is of a very wide connotation and amplitude and includes a large variety of powers which are incidental or consequential to achieve the powers vested in the authority concerned. In the aforesaid case, suspension from service pending a disciplinary inquiry has clearly been held to fall within the ambit of the word 'control'. On a parity of reasoning, therefore, the plain language of Clause (b) of Sec. 59 (3), as extracted above irresistibly leads to the conclusions that the Municipal Commissioner was fully competent to suspend the respondents pen-

ding a departmental inquiry and hence the order of suspension passed against the respondents by the Municipal Commissioner did not suffer from any legal infirmity. The High Court was, therefore, in error in holding that the order of suspension passed by the Municipal Commissioner was without jurisdiction. In this view of the matter the order of the High Court cannot be maintained and has to be quashed.

5. We might, however, mention that although in the criminal case, chargesheet was submitted as far back as September, 1976 we understand that no charges have been framed so far. Criminal cases should be disposed of as quickly as possible so as to protect the accused from unnecessary harassment. We therefore direct the Judicial Magistrate, First Class of Nagpur, to dispose of the Criminal Case No. 1902 of 1976 pending in his file with the utmost expedition and if possible within six months from today. Mr. Sanghi, on behalf of the Municipality, states that he wilfully co-operated with the prosecution in producing all the available evidence before the court and bringing the case to a final conclusion within the period mentioned above.

6. The other question that remains is if the respondents are acquitted in the criminal case whether or not the departmental inquiry pending against the respondents would have to continue. This is a matter which is to be decided by the department after considering the nature of the findings given by the criminal court. Normally where the accused is acquitted honourably and completely exonerated of the charges it would not be expedient to continue a departmental inquiry on the very same charges or grounds or evidence, but the factremains, however, that merely because the accused is acquitted, the power of the authority concerned to continue the departmental inquiry is not taken away nor is its direction (discretion) in any way fettered. However, as quite some time has elapsed since the departmental inquiry had started the authority concerned will take into consideration this factor in coming to the conclusion if it is really worthwhile to continue the departmental inquiry in the event of the acquittal of the respondents. If, however, the authority feels that there is sufficient evidence and good grounds to proceed with the inquiry, it can certainly do so. In case the respondents are acquitted, we direct that the order of suspension shall be revoked and the respondents will be reinstated and allowed full salary thereafter even though the authority chooses to proceed with the inquiry. Mr. Sanghi states that if it is decided to continue the inquiry, as only arguments have to be heared and orders to be passed, he will see that the inquiry is concluded within two months from the date of the decision of the criminal court. If the respondents are convicted. then the legal consequences under the rules will automatically follow.

7. We might mention that at the time when special leave was granted by this Court, it was ordered that the respondents should be paid a lump sum of

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S. M. Fazal Ali
Judge
Supreme Court of India

. 10,000/- each apart from the 75%
owance. We think that in the inte-
t of justice the department may not
sist on the refund of the amount of
ipees 10,000/- until the result of the
partmental inquiry and if the depart-
ental inquiry concludes in their favour, the amount will be either refunded or adjusted against their dues.

8. With these observations, the appeal is accepted and the judgment of the High Court is quashed Parties will bear their own costs throughout.

Order accordingly.

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.Report No 93'P. 06

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

E. S. Venkataramiah
Judge
Supereme Court of India

OBSERVATION

Compulsory retirement—Decision based on State Confidential Reports—Held arbitrary. Judgment of M.P. High Court, D/- 29-7-1982, Reversed. (Constitution of India, Art. 311) Fundamental Rules, R. 56 (1).

OBSERVED BY

O. Chinnappa Reddy,
E. S. Venkataramiah
and R. B. Misra

Hon'ble Judges, Supreme Court of India

IN

Civil Appeal No. 3429 of 1982, decided on 24-1-1984, between J. D. Shrivastava Appellant v. State of M.P. and others, Respondents.

TEXT

Venkataramiah, J. :—The appellant is a judicial officer of the State of Madhya Pradesh, who would have ordinarily retired on January 31, 1984 on attaining 58 years of age. He was appointed as a Munsiff-Magistrate in the erstwhile State of Bhopal in 1953. On reorganisation of States on November 1, 1956, he became a member of the Judicial Service of the State of Madhya Pradesh. He was promoted as an Additional District & Sessiont Judge on January 8, 1974 and was confirmed in that post with effect from November 25, 1974. Consequent upon the decision of the State Government to reorganise the Higher Judicial Service of the State of Madhya Pradesh in accordance with the advice of the High Court of Madhya Pradesh, 101 posts of the cadre of Additional District & Sessions Judges came to be abolished and the incumbents of those posts were to be absorbed as District & Sessions Judges as per Government Memorandum dated February 24, 1981. On the issue of the said Memorandum, the High Court of Madhya Pradesh decided to screen the officers in the cadre of Additional District & Sessiom Judges for the purpose of making recommendation to the State Government about the promotion of selected officers to the cadre of District & Sessions Judges. For this purpose, Full Court Meetings of the Madhya Pradesh High Court were held on February 27 and 28, 1981 and March 1, 1981. The case of the appellant was also considered in that connection. It is stated that at these Meetings, the High Court first resolved to scrutinise the cases of all the judicial

E. S. Venkataramiah
Judge
Supreme Court of India

officers who were to attain the age of 55 years in the year, 1981. In the course of such scrutiny the High Court decided on February 27, 1981 to retire the appellant compulsorily on his attaining the age of 55 years under Rule 56 (3) of the Fundamental Rules. On March 1, 1981 it decided not to recommend him for promotion to the cadre of District & Sessions Judges. Accordingly, the State Government was addressed by the High Court to retire the appellant compulsorily. The appellant thereafter continued as an Additional District & Sessions Judge until he was served with the order of compulsory retirement dated August 28, 1981. Aggrived by that order, the appellant filed a writ petition before the High Court. The petition was dismissed by a Division Bench of the High Court on July 29, 1982. This appeal is preferred by special leave against the judgment of the High Court.

Clause (a) of the Fundamental Rule 56 (3) as amended in 1976 which governs the case of the appellant reads thus :

2. "F. R. 56 (3). A Government Servant may, in the public interest, be retired at any time after he attains the age of fifty-five years without assigning any reason by giving him a notice in writing."

3. It is contended that the order of compulsory retirement is unsustainable on various grounds and the principal ground urged is that the High Court had made the recommendation to retire the appellant compulsorily without applying its mind to the case as required by law that it was a decision based on collateral considerations and that it was arbitrary.

4. It is now firmly settled that the power to retire a Government Servant compulsorily in public interest in terms of service rule is absolute provided the authority concerned forms an opinion bona fide that it is necessary to pass such an order in public interest. It is equally well settled that if such decision is based on collateral grounds or if the decision is arbitrary, it is liable to be interfered with by courts. (See Union of Indian V.J.N. Sinha (1971) 1 SCR 791. We have also gone through the following decisions, namely, Union of India V. M. E. Reddy (1980) 1 SCR 736, Swami Saran Saksena V. State of U. P. (1980) 1 SCR 923, Baldev Rai Chadha V. Union of India (1981) 1 SCR 430, Brij Bihari Lal Agarwal v. High Court of Madhya Pradesh (1981) 2 SCR 297 and D. Ramaswami v. State of Tamil Nadu (1982) 3 SCR 75 which have a bearing on the question before us. We shall now proceed to deal with the facts of the case in the light of the principles enunciated in the above decisions.

5. In Para 10 of the counter affidavit of Shri A. K. Pandey, Additional Registrar of the High Court of Madhya Pradesh filed before this Court it is stated as follows :

"It is not disputed that Full Court Meeting was held on 27th/28th February, as well as 1st March, 1981 to consider the cases of Additional District and Sessions Judges for promotion in the Higher Judicial ervice. It is also not disputed that he petitioner stood at serial No. 10 n the seniority list of Additional istrict and Sessions Judges It is also ot disputed that he was confirmed as dditional District and Sessions Judge n August, 1976. The personal confidntial record of the petitioner is laced before this Hon'ble Court and it) speaks for itself (Annexure R XI to XXVIII). It is wrong to say that ny extraneous consideration operated n the Full Court Meeting against the etitioner and it is wrong to say that he resolutions in the Court Meeting ere unjust, arbitrary or mala fide......... ....As already pointed out, the ecision was taken in Full Court Meeting after consideration of the ntire record of the petitioner. The ecision to retire the petitioner under Fundamental Rule 56 (3) was after due onsideration of the entire record of the etitioner. (Confidential entries are Annexures R-XI to XXXVIII)."

6. On going through the said ounter affidavit we are satisfied that apart from the confidential records, nothing else appears to have been relied on by the High Court to reach the decision that the appellant should be compulsorily retired. We shall now proceed to examine the confidential rolls maintained in respect of the appellant.

7. The Confidential Reports in respect of the appellant are placed before us. It is stated by the Registrar of the High Court in para 13 of the counter affidavit that the appellant's performance for 28 years was taken into consideration for screening under Fundamental Rule 56 (3). The High Court has relied on some adverse remarks relating to 1959-60 or thereabouts. It is true that in the early part of his career, the entries made do not appear to be quite satisfactory. They are of varied kinds. Some are good some are not good and some are of a mixed kind. But being reports relating to a remote period, they are not quite relevant for the purpose of determining whether he should be retired compulsorily or not in the year 1981, as it would be an act bordering on perversity to dig out old files to find out some material to make an order against an officer. We therefore, confined out scrutiny to the reports made in respect of the appellant for about ten years prior to the date on which action was taken against him to retire him compulsorily. We find that all of them except for 1972-73 and 1973 74 are good and quite satisfactory. Even in 1972-73 and 1973-74 it is stated that there was nothing to doubt his integrity and that he was punctual in attending to his work. It may be noted that the appellant was promoted as an Additional District and Sessions Judge on January 8, 1974 and was also confirmed with effect from November 25, 1974 by an order passed in 1976. Any adverse report in respect of an earlier period unless it had some connection with any event which took place subsequently cannot, therefore, reasonably form a basis for forming an opinion about the work of the appellant. We give below a few relevant extracts from the Confidential Reports for the period sub-

sequent to March 31, 1974 :

"Year : 1975

On confidential enquiries from the members of the Bar and from other sources nothing was found against him in respect of his integrity. During surprise check he was found on the board in time. Enquiries from other sources also disclosed that he usually comes in time and does not rise early and engages himself in judicial work. This impression was gathered from judicial diary also. After scrutiny of the cases, the following impression was gathered. Knowledge about rules and orders, law and procedure is adequate but the number of the interlocutory application is sometimes not entered in the margin of the connected order-sheet in red ink. Judgments are good with proper discussion of evidence. Interlocutory matters are not kept unduly pending for long time Rules, regarding pleadings, are evidence etc. are followed. Punishments were adequate. Examination of accused is proper. Charges framed are proper. Record is legible :

Control and supervision over the staff is satisfactory. Judicial diary calls for no particular comments. His relations with the Bar are cordial, with no complaints of any misbehaviour with any litigants. His average disposal during the period in question was of very good category. There is nothing else to comment in particular.

(See table on page No. 633)

Year 1979-80

(a) Shri Shrivastava begeings his judicial work punctually at 11.00 A.M. and works throughout the Court hours. So far, it appears that he has arranged his Cause List judiciously fixing civil work for the day. This Judge understands that there can be no subsequent pleadings except by way of amendment of pleadings, In other words, he understands the purport of Order 8, Rule 9 and Order 6, Rule 7 of the Civil Procedure Code. He also understands what is pleadings i.e. Order 6, Rule 1 of the Civil Procedure Code as compared with oral statement. He so far appears to be equally conversant with Order 17, Rule 1 of the Civil Procedure Code, i.e. adjournment is only granted for sufficient cause. He does not find any difficulty in applying law relating to pleadings and interlocutory matters. So far, his procedure conforms to rules of pleadings, filing of documents, framing of issues and recording of evidence.

(b) So far, on the criminal side, he frames charges with care, records evidence with such care and prepares examination of accused with equal care.

(c) So far, he makes a neat and legible record. He generally supervises the work of ministerial staff.

(d) His iudgments, both on civil and criminal so far, appear to be well written. He is prompt in his disposals including doing work therein. His work, as a whole, so far, has been found to be of high quality He also takes up civil work. His relations with the Bar, ao far, appear to be cordial.

(e) The above remarks are subject to the D.O. No. 462/C.Rs./1979 Jabalr dated 6-3-80 of the High Court.

(Note : The Memo, sent to the app-lant in March, 1980 only informed him two remarks—(1) that he did not spose of Sessions trials quickly and (2) that he did not follow the amended provisions under Order 39, Rule 3 of the Civil Procedure Code. The Memo. also disclosed that the appellant did not write judgments in civil appeals according to.

Year : 1976

nowledge of law and judicial capacity :	Good
emarks about his promptness in the isposal of cases :	Promptness satisfactory
emarks about reputation of integrity d impartiality :	Nothing was found against his integrity or impartiality
eneral Remarks :	He was mostly puntcual and did not rise early. Judgments were proper and contained the required discussion of evidence Charges and examination of accused and issues were proper. Promptness in framing of issues was marked in recent months. Control and supervision over the staff was satisfactory. Setting dates should not normally be of more than two weeks as was noticed in certain cases. Interlocutory matters were generally not kept unduly pending.
et Result :	Good

Year 1976-77

nowledge of Law and Judicial capacity :	Satisfactory
emarks about his promptness in the isposal of cases.	Generally prompt
ercentage of average monthly disposal :	184 1/2%
ehaviour towards members of the Bar nd Public:	Cordial
eneral Remarks :	Satisfactorily managing heavy and exclusive civil file. Most punctual
	Good

Year 1977-78

et Result :	Good
nowledge of Law and Judicial capacity:	Entry against almost all the columns in the Report-Good.

E. S. Venkataramiah
Judge
Supreme Court of Indi

General Remarks : Has good grasp of facts and law. Judg ments in proper form and well written.

Net Result : Good

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the pattern prescribed; that Sessions trials were not conducted quickly and that (he) granted unduly long adjournments of about a month or so for examination of accused and defence witnesses. The appellant sent a prompt reply to it on March 28, 1980 refuting the correctness of the above remarks. We have gone through the said reply. On going through the facts mentioned therein, we feel that the remarks against him appear to be totally uncharitable. It shows that the appellant has disposed of more number of cases than what ordinarily could be disposed of during the relevant period. We are not informed of what action was taken on his prayer for expunging the said remarks).

Year 1980-81

His out turn during the year was about 200 percent. The quality of work may be classed as good. 'B' category. No specific complaints were received against him about his behaviour or integrity."

8. The above reports no doubt speak for the themselves as stated in the counter affidavit of the Additional Registrar. But they all speak in favour of the appellant and not against him. A perusal of these reports shows that there was nothing against the appellant which necessitated the action which was taken against him. In the state of the above record it was impossible to take the view that the appellant was liable to be compulso rily retired, unless there was any othe circumstance which was adverse to him We have found it necessary to incor porate in this judgment the relevan confidential remarks in great detai only to show that the action af th High Court was not called for. W may state here that the learned counse for the High Court very fairl stated that there was no other circu mstance against the appellant durin the period subsequent to 1971 whic would support the order of compulsory retirement. From what has bee stated we find that the decision take by the High Court in respect of th appellant is arbitrary as it was mainl based on the entries that wer made about 20 years before the dat on which the decision was taken. Dependence on such stale entries canno be placed for retiring a person compulsorily, particularly when the office concerned has been promoted subsequent to such entries, as held by this Court in D. Ramaswami's cas (1982 (3) SCR 75 (supra). In that cas one of us (Chinnappa Reddy, J.) observed thus at pages 79-80 (of SCR) :

"In the face of the promotion o the appellant just a few months earlie and" nothing even mildly suggestiv of inaptitude or inefficiency thereafte it is impossible to sustain the orde of the Government retiring the appe-

E. S. Venkataramiah
Judge
Supreme Court of India

llant from service. The learned counsel for the state of Tamil Nadu argued that the Covernment was entitled to take into consideration the entire history of the appellant including that part of it which was prior to his promotion. We do not say that the previous history of a Government servant should be completely ignored, once he is promoted. Sometimes past events may help to assess present conduct. But when there is nothing in the present conduct casting any doubt on the wisdom of the promotion, we see no justification for needless digging into the past."

9. In the result the judgment of the High Court is reversed and the resolution of the High Court recommending to the Government that the appellant should be compulsorily retired and the impugned order passed thereon under Fundamental Rule 56 (3) are quashed. The resolution of the High Court that the appellant was not fit for promotion to the cadre of District and Sessions Judges is also quashed. The High Court should now consider in the light of this decisions whether the appellant was entitled to be promoted as a District and Sessions Judges as on the date on which his immediate junior was promoted and make appropriate recommendation to the State Government. The appellant is entitled to all consequential financial and other benefits as if the order of compulsory retirement had not been passed.

10. The appeal is accordingly allowed with costs.

Appeal allowed.

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Report No. 94, P. 08

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

E. S. Venkataramiah
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art. 311 (2)–Order of discharge merely a camouflage for an order of dismissal for misconduct—Reasonable opportunity to defend not given—Order is liable to be struck down. Decision of Delhi High Court, D/- 30-8-1982. Reversed.

OBSERVED BY

E. S. Venkataramiah and
R. B. Misra
Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 3040 of 1982, decided on 24-1-1984, between Anoop Jaiswal, Appellant v. Government of India and another, Respondents.

TEXT

Venkataramiah, J.—June 22, 1981 was really a bad day for the appellant Anoop Jaiswal who having been selected by the Union Public Service Commission for appointment in the Indian Police Service was undergoing training as a probationer at the Sardar Vallabhbhai Patel National Police Academy, Hyderabad along with other probationers. On that day all the probationers were expected to be present at 5.50 A.M. at the field where the ceremonial drill practice was to be conducted. Since it was raining at that time it appears that the venue was shifted to the Gymnasium Hall where it was proposed to conduct P. T./unarmed combat practice and intimation was sent to the trainees at the Mess When the Assistant Director (Outdoor Training) reached the Gymnasium at 5 50 A.M. none of the probationers had reached there. They all reached the place 22 minutes late i. e. by 6.15 A.M. when the rains had abated and the parade commenced at 6.15 A M. It appears that earlier when a messenger sent by the Assistant Director had gone to call the probationers they had asked for a vehicle to go to the place as it was raining. The delay was considered as an incident which called for an enquiry. Explanation was called from all the probationers. The appellant was considered to be one of the ring leaders who was responsible for the delay. When the appellant was asked about the incident he gave his explanation to the Director of the National Police Academy which read thus ;

"To,

The Director,
National Police Academy,
Hyderabad.

Dear Sir,

In reply to your Memo. dated 22nd June, 1981 I humbly submit that as for my being late in P.T. by **10 mts.** I sincerely regret the lapse. **But the** second charge that I instigated others to do so is totally baseless and without a single iota of truth. I request you Sir to make a thorough enquiry into such an allegation. I never had nor have such plebeian mentatality.

Thanking you,

Yours sincerely,
Sd/-
Anoop Jaiswal

2. It would appear that the Director without holding an enquiny into the alleged misconduct recommended to the Government of India that the appellant should be discharged from the service. On the basis of the above report the Government of India passed the order of discharge dated November 9, 1981 and communicated it to the appellant. The material part of the order reads thus :

"No. I-22011/9/81-Pers. III Government of India/Bharat Sarkar Ministry of Home Affairs/Grih Mantralaya
New Delhi-110001, the 9th Nov. 1981

ORDER

Whereas the Central Government is satisfied that Shri Anoop Jaiswal, appointed to the Indian Police Service on probation on the result of the Civil Service Examination held in the year 1979, is unsuitable for being a member of the said service, he is hereby discharged under clause (b) of Rule 12 of the Indian Police Service (Probation) Rules. 1954.

The order of discharge will ta
effect from the date on which it is serv
on the said Shri Anoop Jaiswal

In the name of and on behalf of t
President of India.

Sd/-
(Narendra Prasa
Director"

3. On receipt of the above ord
of discharge, the appellant made a r
presentation on November 14, 1981
the Government of India to reconsid
the matter. It appears that the Direct
of the National Police Academy on th
occasion recommened that the appe
ant may be reinstated. The represen
ation was rejected by the Government
India on April 8, 1982. Thereafter,
filed a petition under Article 226 of th
Constitution before the High Court
Delhi contending that the order of di
charge was violative of Article 311 (
and Article 14 of the Constitutio
That petition was dismissed by the Hi
Court at the stage of admission on Au
ust 30, 1982 after hearing the couns
for the Union of India. Against th
judgment of the High Court, the appe
ant has filed this appeal with speci
leave under Article 136 of the Constit
tion.

4. The main contention of the appel
ant before us is that the order discharg
the petitioner though on the face of
appears to carry no stigma is in reali
an order terminating his service on th
ground of misconduct alleged to hav
been committed by him on June 22, 198
in acting as one of the ring leaders wh
were responsible for the delay of abo

twenty-two minutes in the arrival of the probationers at the Gymnasium and that such an order could not have been passed without holding an enquiry as contemplated under Article 311 (2) of the constitution and the relevant rules governing such an enquiry. He has also contended that the order is based on conjectures and surmises and by way of illustration he has referred us to paragraph 13 of the counter-affidavit which reads thus:

"Para 13 :

The petitioner did not conduct himself fully in accordance with the prescribed rules and regulations during his training period. On one occasion when he was sanctioned leave for 16 days in the month of May, 1981, he did not report himself for duty in time. He absented himself wilfully on 1-6-1981 without applying for leave for the day. For this action, he was warned by the Director against recurrence, of such conduct. The period of his wilful absence for one day was treated as leave without pay. On two earlier occasions, the petitioner's conduct was found prejudicial to good order and discipline; on the first occasion he was verbally counselled by the Chief Drill Instructor and on the second occasion a Memo was issued to him.

There was no gradation maintained in Academy about the attendance, in terms of which the petitioner had the record of being second (or may be third) highest in the Academy.

However, this record in this respect was otherwise satisfactory".

5. The reply of the appellant to the above allegation is found in paragraph 6 of the rejoinder affidavit filed by the appellant which reads :

Re: Para 13 : The averments made in paras13 of the petition are reiterated and the contentions of the respondent to the contrary are denied as incorrect. It is reiterated that the petitioner conducted himself fully in accordance with rules and regulations. The allegation made by the respondent that I absented myself wilfully on 1-6-1981 without applying for leave for the day is highly misleading. The correct fact is that I was sanctioned my Earned Leave on 15-5-81 for a period of 16 days, and I was to report back for duty on 1-6-81 before 12 00 noon. I made arrangements to reach Hyderabad before 8 00 a. m. on 1-6-1981. However, on account of late running of train in which I was travelling and consequently missing the connecting train, I could reach Hyderabad only around noon and I reported at 1 00 p m. All these facts were duly explained to the Asstt. Director, Outdoor Training and be permitted to attend the afternoon classes on 1-6-81 which I did. (However, at his suggestion, I applied for leave for the day and the leave was sanctioned without pay). It is incorrect to say that I was warned for this All that the Director said was that on such situations, the proper course was to apply for a day's leave which I did as stated earlier. It is, therefore, very unreasonable to characterise the said incident as wilful absence. The further allegation that on the earlier occasions, the petitioner's conduct was found prejudicial to good order and discipline, is very vague and without any particulars. Counselling by the Instructor concerned is a routine affair and, in fact, the Instructors are meant to counsel. Even regarding the second occasion, when a memo was said to have issued, it is not stated as to what the offence was. It is significant to note that the respondent has not denied the allegation made by me that I was not the only one who received such memos and that without exception all the probationary officers had at some time or the other received such memos. I deny the rest of the allegations and reiterate the averments made in para 13 of the petition."

6. The learned counsel for the parties have cited a number of decisions before us in support of their respective cases. On going through them we are of the view that there is not much divergence in them as to the true legal principles to be followed in matters of this nature but the real problem appears to be one of application of those principles in a given case in determining whether the particular action taken amounts to a punishment attracting Article 311 (2) of the Constitution or mere discharge simpliciter not requiring the holding of an enquiry as contemplated under Article 311 (2). We shall now deal with two leading cases having a bearing on the question before us. In Parshotam. Lal Dhingra v. Union of India 1958 SCR 828 : this Court after an elaborate consideration of the relevant provisions of the Constitution and judicial decisions cited before them observed.

"The net result is that it is only in those cases where the Government intends to inflict those three forms of punishments that the Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to them. It follows, therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment then the Government servant whose service is terminated cannot claim the protection of Art. 311 (2) and the decisions cited before us and referred to above, in so far as they lay down that principle, must be held to be rightly decided

The foregoing conclusion, however does not solve the entire problem, for it has yet to be ascertained as to when an order for the termination of service is inflicted as and by way of punishment and when it is not... ... ...

Where a person is appointed to a permanent post in a Government service on probation, the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment, for the Government servant, so appointed, has no right to continue to hold such a post any more than the servant employed on probation by a private employer is entitled to do. Such a termination does not operate as a forfeiture of any right of the servant to hold the post, for he has no such right and obviously cannot be a dismissal, removal or reduction

in rank by way of punishment...........
It does not, however, follow that, except in the three cases mentioned above, in all other cases, termination of service of a Government servant who has no right to his post, e.g., where he was appointed to a post, temporary or permanent, either on probation or on an officiating basis and had not acquired quasi permanent status, the termination cannot, in any circumstances, be a dismissal or removal from service by way of punishment. ....

In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Art. 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art. 311 must be complied with."

7. The case of Samsher Singh v. State of Punjab (1975) 1 SCR 814 decided by a Bench of seven Judges of this Court directly deals with the case of a probationer who is discharged from service without complying with Article 311 (2) of the Constitution. In that case two Judicial Officers of the Punjab Judicial Service were involved. For purposes of the present appeal it is sufficient if we refer to the case pertaining to Ishwar Chand Agarwal who was at the material time serving as a probationer in the Punjab Civil Service (Judicial Branch) By an order dated December 15, 1969 his services were terminated. The said order did not contain any statement which would attach any stigma to the career of the officer concerned. It reads as follows.

"On the recommendation of the High Court of Punjab and Haryana, the Governor of Punjab is pleased to dispense with the services of Shri Ishwar Chand Agarwal, P.C.S.(Judicial Branch), with immediate effect, under Rule 7 (3) in Part 'D' of the Punjab Civil Services (Judicial Branch) Rules, 1951, as amended from time to time."

8. Rule 7 (3) of the Punjab Civil Service (Judicial Branch) Rules, 1951 relied on in the above order provided that on the completion of the period of probation of any member of the service, the Governor might on the recommendation of the High Court confirm him in his appointment if he was working against a permanent vacancy, or if his work or conduct was reported by the High Court to be unsatisfactory, dispense with his services or revert him to his former substantive post, if any or extend his period of probation and thereafter pass such orders as he could have passed on the expiry of the first period of probation. In this case Ray,

C. J. observed in the course of his Judgment thus :

"No abstract proposion can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311 (2) of the Constitution.

Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any Rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311 (2) he can claim protection.

9. Having said so, the learned Chief Justice proceeded to examine the facts of the case and found that an enquiry officer nominated by the Director of Vigilance had recorded statement of some witnesses behind the back of the officer concerned in respect of certain allegations of misconduct and had on that basis made a report to the High Court and that the High Court had after accepting the said report, made a recommendation to the Governor to the effect that the officer was not a suitable person to be retained in service. The order of termination was because of the recommendations in the report. Then the learned Chief Justice observed :

"The order of termination of the services of Ishwar Chand Agarwal is clearly by way of punishment in the facts and cricumstances of the case. The High Court not only denied Ishwar Chand Agarwal the protection under Article 311 but also denied itself the dignified control over the subordinate judiciary. The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the fact and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Iswar Chand Agarwal. The Cader of termination is illegal and must be set aside."

10. Krishna Iyer, J. who agreed with the learned Chief Justice had at the end of this judgment this to say,

"Again, could it be that if you summarily pack off a probationer, the order is judicially unscruitable and immune ? If you conscientiously seek to satisfy yourself about allegation by some sort of enquiry you get caugh in the coils of law, howevcr harmlsssly the order may be phrased. And, so this sphinx-complex has had to give way to later cases. In some cases the rule. of guidance has been stated to be 'the substance of the matter' and the 'foundation' of the order. When does 'motive' trespass into 'foundation'? When do we lift the veil of form to touch the 'substance'? When the Court says so. These 'Freudian' frontiers obviously fail in the work-a-day world and Dr. Tripathi's observation in this context are not without force. He says :

"As already explained, in a situation where the order of termination purports to be a mere order of discharge without stating the stigmatizing results of the departmental enquiry a search for the 'substance of the matter' will be indistinguishable from a search for the motive (real, unrevealed object) of the order. Failure to appreciate this relationship between motive (the real, but unrevealed object) and from (the apparent, or officially revealed object) in the present context has led to an unreal interplay of words and phrases wherein symbols like 'motive', 'substance' 'form' or 'direct' parade in different combinations without communicating precise situations or entities in the words of facts."

11. On behalf of the Union of India reliance has been placed on State of Punjab v. Sukh Raj Bahadur (1968) 3 SCR 234. Union of India v. R. S. Dhaba (1969) 3 SCC 603, State of Bihar v. Shiva Bhikshuk Misra (1971) 2 SCR 191 R.S. Sial v. State of U.P. (1974) 3 SCR 754 State of U.P. v. Rama Chandra Trivedi (1977) 1 SCR 462 I. N. Saksena v. State of Madhya Pradesh (1967) 2 SCR 496. We have gone through these decisions. Except the case of Ram Chandra Trivedi (supra all other cases referred to above were decided prior to the decision in Samsher Sing's case (AIR 1974 SC 2197) (supra) which is a judgment delivered by a Bench of seven Judges. As pointed out by us in all these cases including the case of Ram Chandra Trivedi (supra) the principle applied is the one enunciated by Parshotam Lal Dhingra's case (AIR 1958 SC 36) (supra) which we have referred to earlier. It is urged relying upon the observation in Shri Sukh Raja Bahadur's case (supra) that it is only when there is a full scale departmental enquiry envisaged by Article 311 (2) of the Constitution i. e. an

enquiry officer is appointed, a chargesheet submitted explanation called for and considered, any termination made thereafter will attract the operation of Art. 311 (2) It is significant that in the very same decision it is stated that the circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial. As observed by Ray, C. J. in Samsher Singh's case (supra) the form of the order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the fact and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Art. 311 (2).

12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.

13. In the instant case, the period of probation had not yet been over. The impugned order of discharge was passed in the middle of the probationary period. An explanation was called for from the appellant regarding the alleged act indiscipline, namely, arriving late at the Gymnasium and acting as one of the ring leaders on the occasion and his explanation was obtained. Similar explanations were called for from other probationers and enquiries were made behind the back of the appellant, Only the case of the appellant was dealt with severly in the end. The cases of other probationers who were also considered to be ring leaders were not seriously taken note of even though the order of discharge may be non-committal, it cannot stand alone. Though the nothing in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read along with the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Art. 311 (3) of the Constitution.

14. The Union of India has placed before us all the relevant material including the recommendations of the Director of the National Police Academy that the appellant may be

reinstated In this case, as stated above explanation was called from the appellant and other probationers. Explanations were received and all the probationers including the appellant were individually interviewed in order to ascertain facts. Explanation submitted by him and the answers given mitted by him and the answers given by others had weighed with the Director before making the recommendation to the Government of India on the basis of which action was taken. The only ground which ultimately prevailed upon the Director was that the appellant had not shown any sign of repentance without informing him that his case would be dealt with leniently if he showed any sign of repentance In fact in the very first reply he gave to the Director on being asked about the incident which took place on June 22, 1981, the appellant stated 'I sincerely regret the lapse'. Neither in the letter which the Director first wrote to the Central Government nor in the counter-affidavit filed in this Court, due importance has been given to the said expression of regret and it is further seen that no additional lapse on the part of the appellant between June 22, 1981 and the date on which the Director wrote the letter to the Central Government, which would show that the appellant had not shown any sign of repentance is pointed out, although there is a reference to his reporting to duty late on an earlier date on June 1, 1981. On going through the above record before the Court and taking into account all the attendant circumstances we are satisfied that the Director wished to make the case of the appellant an example for others including those othere probationers who were similarly situated so that they may learn a lesson therefrom.

15. A narration of facts of the case leaves no doubt that the alleged act of misconduct on June 22, 1981 was the real foundation for the action taken against the appellant and that the other instances stated in the course affidavit are mere allegations which are put forward only for purposes of strengthening the defence which is otherwise very weak. The case is one which attracted Art. 311 (2) of the Constitution as the impugned order amounts to a termination of service by way of punishment and an enquiry should have been held in accordance with the said constitutional provision. That admittedly having not been done, the impugned order is liable to be struck down. We accordingly set aside the judgment of the High Court and the impugned order dated Nov. 9 1981 discharging the appellant from service The appellant should now be reinstated in service with the same rank and seniority he was entitled to before the impugned order was passed as if it had not been passed at all He is also entitled to all consequential benefits including the appropriate year of allotment and the arrears of sarary and allowances up to the the date

of his reinstatement. The appeal is accordingly allowed.

16 The appellant had to face this case just at the commencement of his career. We have allowed his claim in the name of the Constitution. This should help him to regain his spirit and also encourage him to turn out to be public servant in the true sense of that empression.

17. Having regard to the facts and circumstances of the case, we feel that the parties should be directed to bear their own costs.

Appeal allowed.

D. A. Desai
Judge
Supreme Court of India

OBSERVATION

Premature Retirement—Police constable—Participation in police agitation—Suspension—Constable reinstated as per dicision of Supreme Court and compulsorily retired on same day—Order held, was not in public interest but to make pretence of reinstatement and get rid of the constable C.W.P. No. 1137 of 1983, D/- 18-7-1983 (Punjab & Har) Reversed. Constitution of India Art. 311) Punjab Civil Services (Premature Retirement) Rules (1975), R. 3.

OBSERVED BY

D. A. Desai and
Ranganath Misra,

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 1649 of 1984, decided on 13-3-1984, between Baldev Raj, Ex-Constable, Appellant v. State of Punjab and others, Respondents.

TEXT

Desai, J. :—special leave granted.

2. It is rather unfortunate that the respondents despite the judgment of this Court in Sengara Singh v. State of Punjab (1983) 4 SCC 225 by their inaction force law paid police constables to come to this Court and occasionally devious methods are employed to circumvent the decision.

3. In Sengara Singh's case, this Court held that the State Government cannot discriminate in the matter of condoning the lapes between two government servants wholly similarly situated. This Court held as under :

"As a sequel to police agitation, the State Government dismissed about 1100 members of the Police Force on the allegation that they participated in the agitation. The State Government also filed criminal prosecutions against a large number of the agitators. Subsequently, the State Government reinstated 1000 dismissed members of the police Force in their original posts and withdrew the criminal cases against them. If the filing of the criminal cases was the distinguishing feature, which would distinguish the case of the present appellants from others, that feature has become irrelevant because the criminal cases against those who were subsequently reinstated have been withdrawn. It is not suggested that the present appellants were leaders or indulged into more violent activities. We repeatedly questioned the learned counsel to specify the distinguishing feature of the present appellants from thoseins whose case the Committee recommended the reinstatement and the State Government accepted the recommendations. There is not an iota of evidence which would distinguish the case of the present appellants from those who were the beneficiaries of the indulgence of the Committee and the largesse of the State. The net result has been that the present appellants have been arbitrarily weeded out for discriminatory and more severe treatment than those who were similarly situated. This discrimination is writ large on the record and the Court cannot overlook the same."

This Court directed reinstatement of the appellants in that case It appeared that some of the members of the Police Force who could not afford the luxury of rushing to this Court, subsequently at intervals approached the Court for similar relief, and the same was invariably granted. It was also pointed out to the learned counsel for the respondent State that the State should extend the benefit of the judgment of this Court to all who are similarly situated However, the response is unsatisfactory. This case will illustrate the same.

4. Appellant joined service as constable in the Police Force of Punjab on July 7, 1951. It was alleged that he participated in the agitation by the members of the Police Force in the year 1979. He was prosecuted for an offence under Sec. 29 of the Police Act read with Sec. 9 of the Punjab Security and F. C. M Act. Consequent upon the launching of the prosecution, appellant wa suspended from service But it i admitted that the prosecution wa subsequently withdrawn. Thereafter the appellant was reinstated on Fedruary 11, 1980 and on the same day h was compulsorily retired from service after giving him pay for a period o three months in lieu of notice. Th appellant contended that order o comulsory retirement was a device t circumvent the decision of this Cour and, therefore, a mere show was made of reinstating him in service and compulsorily retiring him from service on the same day. The appellant accordingly questioned the validity of the order of compulsory retirement in Civil Writ Petition No. 1137 of 1983 in the High Court of Punjab and Haryana at Chandigarh. A Division Bench of the High Court dismissed the petition in limine Hence this appeal by special leave.

5. A notice to show cause was issued calling upon the respondents to explain why special leave should not be granted. Mr S. K. Bagga, learned counsel appeared for the respondents, When the matter came up before this Court on January 30, 1984 after perusing the counter-affidavit filed by one Shri S S. Bains, I.P.S. Senior Superintendent of Police, Sangrur, the respondents were called upon to produce the file relevant to the order of compulsory retirement of the appellant. We specifically asked the respondents to inform the court as to who proposed the compulsory retirement of the appellants and who finally accepted the proposal

and which public interest was sought to be served by compulsorily retiring the appellant on the same day on which he was reinstated in service. We also called upon the respondents to disclose the annual confidential reports in respect of the appellant which may have been taken into consideration in reaching the conclusion that it was necessary in Public interest to retire the appellant from service.

6. In response to this query, Shri S S. Bains has filed his further affidavit in which he has stated that one Shri Baljit Singh Bhullar, IPS, the then Superintendent of Police, Sangrur passed the orders of compulsory retirement of the appellant on his own and that the relevant consideration as set out in the Punjab Civil Services (Premature Retirement) Rules, 1975 were taken into consideration at the time of passing the impugned order. This rule provides that the appropriate authority shall, if is of the opinion that it is in public interest to do so, have the absolute right by giving an prior notice in writing to retire that employee on the date on which he completes twenty five years of qualifying service or attains fifty years of age or on any date thereafter to be specified in the notice."

7. Mr. S. K. Bagga, learned counsel for the respondents urged that the appellant was compulsorily retired in public intrest. Public interest is an unruly horse and once it is alleged that the order was a device to circumvent the decision of this Court, it was obligatory upon the respondents to explain why it became necssary to retire the appellant in public interest. It is true that dead wood has to be weeded out that itself should not become a cloak to wreak vengeance. The officer who passed the order of compulsory retirement has not filed his counter-affidavit explaining the circumstances in which he considered it in public interest to compulsorily retire the appellant. Mr. S. S. Bains, who has filed the counter-affidavit claims to have no knowledge of the circumstances which necessitated compulsory retirement of the appellant. It is in this background and keeping in view the fact that while the appellant was reinstated on February 11, 1980 in the forenoon, on the same day in the afternoon he was compulsorily retired from service. In effect the decision to reinstate. was taken simultaneously with the decision to retire him. It is in the backdrop of these facts which left us agitated that we called upon the respondents to disclose the file in which administrative decision was taken. It may be mentioned that no privilege is claimed. The file is not shown on the specious plea that no such file is maintained. It is conceded in para 5 of the counter-affidavit that no annual confidential reports are maintained in the case of constables. This left us completely guessing as to what must have weighed with the competent authority to pass the impugned order of retirement which is a bold order merely reciting the words of the relevant rule. The order of

D. A. Desai
Judge
Supreme Court of India

compulsory retirement affects the livelihood of the person in whose respect the order is made and it cannot be left to the guess work to decide what prompted the making of such an order We are disinclined to accept the submission that no file was maintained. In the absence of any record and the annual confidential reports, it must be confessed that there was no material before the competent authority to pass the impugned order. When in view of the judgement of this Court it became obligatory to reinstate the appellant service, the power to order compulsory retirement was exercised not in pulic interest but to make a pretence of instatement and to get rid of the appellant. The High Court, in our opinion, was clearly, in error in dismissing such a petition in limine. Accordingly, this appeal succeeds and is allowed and the order of compulsorily retiring the appellant from service dated February 11, 1980 is quashed and set aside. If the appellant has not reached the age of superannuation, he must be reinsated in service. If he had reached the age of superannuation, he should be paid the salary, wages and other terminal benefits for the peaiod February 11, 1980 till the date of his superannuation. The respondents shall pay the costs of the appellant quantified at Rs. 1,000/-

Appeal allowed.

eport No. 98, p. 01

R.N. Misra
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Arts, 14, 16—Appointment—Reservation—Govt. order oviding 18% reservation for Scheduled Castes—Appointment denied to candidate, member of Schedule Castes, without following a roster register contemplated by ovt. order, on the ground that more than 21% of the posts in the Grade III in nich said post fell were already being manned by people belonging to Scheduled astes at the relevant time Not proper. (Paras 5, 6).

OBSERVED BY

R. S. Pathak and
Ranganath Misra

Hon'ble Judges, Supreme Court of India.

IN

Writ Petn. No. 4007 of 1982, decided on 13-4-1983, between Hira Lal, Petitioner The District Judge, Ghaziabad and others, Respondents.

TEXT

Ranganath Misra, J:—Petitioner, ho offered himself as a candidate for ne of the posts of Stenographer in Iindi in the establishment of District udge at Gaziabad in the State of Uttar radesh, has come with this petition nder Article 32 alleging the violation f his fundamental rights enshrined in rticles 14 and 16 of the Constitution. Ie has pleaded that he is a member of ne scheduled castes and the State Govenment by a general order in March 965 had directed that "in services subrdinate to U.P. Government for recritment through competition" 18% of he posts should be reserved for memers of the scheduled castes. He further lleged that when six vacancies in the ost of Stenographer in Hindi were dvertised to be filled up and he offered imself as a candidate, he was examined in shorthand test on April 17, 1982, and was shown in the third place in the list of successful candidates pubished on April 24, 1982, and was called to an interview on May 1, 1982. According to him, the final list of successful candidates his Position was shown as No. 7 and, therefore, he was not selected. He complains that he was downgraded from the third place without justification, and if the Government order of reservation of 18% had been kept in view, he should have been selected even if he secured the seventh place in the merit list.

2 In the return to the rule, the Additional District Judge of Ghaziabad has indicated the petitioner had secured eighth place in shorthand test and his name figured as No. 3 in the list of successful candidates as it has

R. N. Misra
Judge
Supreme Court of India

been drawn up in alphabetical order. At the interview he improved his position and was ultimately shown as No. 7. In the selection no reservation had been intended to be made in view of the position that post of Stenographer is covered under Class III service and the total strength of Class III employees in the judgeship of Ghaziabad as on May 1, 1982, was 132 and there were as many as 28 among them belonging to the scheduled castes which came to more than 21%—3% above the reservation. An assertion was made that the process of recruitment had been fair and bonafide.

3 A rejoinder has been filed by the petitioner accepting the position that "the written test and the interview were done without any mala fide" but reiterating the contention that the direction regarding reservation should have been applied and the petitioner appointed on selection

4. It is not the case of the answering respondent that reservation indicated in Government order of 1965 was not applicable to the relevant recruitment and the assertion of the petitioner that in the previous years provision of reservation was implemented has also not been disputed. The scheme in the Government order contemplates a roster register for every 25 vacancies and prescribes the following mode:

(1) 1 reserved for scheduled castes.
(2) 2-6 unreserved.
(3) 7 reserved for scheduled castes.
(4) 8-12 unreserved.
(5) 13 reserved for schedu castes.
(6) 14-18 unreserved.
(7) 19 reserved for schedu castes.
(8) 20-24 unreserved.
(9) 25 reserved for schedu castes.

5. Paragraph 2 of the Governm order states : "if in an particular y there are only two vacancies, no m than on should be considered reserv and if there is only on that should considered unreserved; the reservati shall be valid up to three years'" Wh six vacancies were being filled up a ti in one year, if the roster was to be fo owed, one of posts would indisputal have gone to the candidate of the sche uled castes. The stand taken in t counter-affidavit that more than 21 of the posts in the Grade III of the cad judge ship were being manned by t people belonging to the scheduled cast at the relevant time is no answer to t prescription the roster. It is n known whether some of the recrui of earlier years already in servi belonging to the scheduled castes h come on the basis of overall merit wit out reference to reservation.

6. On the premise, if the provisic of reservation had to be kept in vie the petitioner was bound to have bee recruited. We allow the petition. A per the roster, he was entitled to b appointed against the first vacanc We, therefore, direct the appointin

R. N. Misra
Judge
Supreme Court of India

authority to appoint the petitioner in that vacaucy and five out of the six who are respondents 3 to 8 before us according to their position in the final merit list shall be retained.

7. We make no order as to costs.

Petition allowed.

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Report No. 98, P. 04

IT IS THE ESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

Report No. 100, p. 01

M. P. Thakkar
Judge
Supreme Court of India

OBSERVATION

(A) Prevention of Corruption Act (2 of 1974), S 5 (1) (b) —Demanding and accepting illegal gratification—Oral evidence corrborated by circumstantial evidence—Circumstantial evidence consistent with quilt of accused and not consistent with his innocence—Prosecution case has to be accepted—Trap witnesses, not independent—Immaterial, (Evidence Act (1872), S. 3)

(B) Criminal P. 1973 (2 of 1974), S. 378—Appeal against acquittal—High Court in appeal aquitting accused convicted by lower Court—High Court resorting to surmises and conjectures without having any basis—No such plea or defence taken by accused—Decision of High Court cannot be sustained. Criminal Appeal No. 1237 of 1979, D/-22-7-1980 (All), Reversed.

OBSERVED BY

S. Murtaza Fazal Ali,
A. Varadarajan and
M. P. Thakkar

Hon'ble Judges Supreme Court of India.

IN

Criminal Appeal No. 609 of 1981, decided on 21-9-1983, between State of U.P., Appellant v. Dr G.K. Ghosh, Respondent.

TEXT

Thakkar, J. :–A doctor in a Government Hospital was found quilty of demanding and accepting illegal gratification from the father of a patient under his treatment at the Hospital and was convicted for an offence under Section 5(1) (d) of Prevention of Corruption Act, 1947, and for an offence under Section 161 of Indian Penal Code by the Special Judge, Kanpur. The appeal preferred by the convict, Dr. Ghosh was allowed, and the order of conviction and sentence was set aside by the High Court. The State has called into question the said order of acquittal rendered by the High Court in this appeal by special leave.

2. The High Court allowed the appeal on forming the opinion that Dr. Ghosh (the respondent herein) might have demanded and accepted the amount as and by way of his professional fees inasumch as a Government doctor was permitted to have private practice of his own as per the relevant rules, though such was not his defence at any stage.

3. Having regard to the facts and circumstances of the case, even the learned councsel for the respondent is una-

ble to support the reasoning which found favour with the High Court. The respondent accused had not offered any such explanation in his statement recorded under Section 313 of the Code of Criminal Procedure. In fact the defence of the respondent before the Sessions Court was that he had never accepted any such amount from P.W. 3 Babulal. It was his case that the story regarding passing of the currency notes was connected and that he had not accepted any currency notes from P.W. 3, as alleged by the prosecution. According to him he had been 'framed'. What is more, it is obvious that if the respondent had accepted monetary consideration in respect of a patient being treated at the Government hospital, it could scarcely have been contended that it was a part of permissible private practice and not illegal gratification. The High Court resorted to surmises and conjectures for which there was not the slightest basis, apart from the fact that no such defence was taken and no such plea was ever advanced by the respondent accused. Under the circumstances the decision of the High Court cannot be sustained on the basis of the reasoning which found favour with it. The finding of guilt, recorded by the Sessions Court, will therefore have to be examined afresh on merits, since the High Court has altogether failed to undertake the exercise of scrutinizing, and making assesment of the evidence. If only the High Court had performed this function as usual, and had recorded its finding in regard to the question of reliability and credibility of witnesses, and after weighing the probabilities and taking into account the circumstantial evidence, had recorded a finding of fact, as it was expected to do, we would not have been obliged to undertake this function which properly falls within the sphere of the High Court in its capacity as the appellate court. As it is, in the peculiar facts and circumstances of the case, we have no option but to do so here.

4. The prosecution case broadly stated is as under.

5. Respondent was an Orthopaedic Surgeon in the UHM Hospital at Kanpur. He was incharge of the Orthopaedic Department. In his capacity as a Government Medical Officer he was allotted an official residence within the campus of the Hospital. As per the then prevailing rules he was permitted consultation practice at his residence in the evening. One Kumari Ramsri, 13 years' old daughter of P.W. 3, Babu Lal a worker employed in a parachute factory as a packer was suffering from bone T. B. and was admitted to the UMH (?) Hospital on 18th February 1976. She was referred to the Orthopaedic section on 19th February 1976. She was placed under the treatment of respondent Dr. Ghosh. After about six or, seven days the respondent asked P. W. 3 to remove the patient from the hospital saying that she was cured P.W. 3 objected saying that the condition of his child had not improved. The respondent asked P.W. 3 to see him at his residence in the evening. It appears that at the hospital Babu Lal learnt

at he would have to pay some money
the respondent, Dr. Ghosh, if he
anted his child to be treated properly
W. 3 therefore paid Rs. 20/-to the
spondent when he called on him at his
sidence in the evening as suggested
rlier. Thereupon the respondent told
W. 3 that his child would be permi-
ed to remain in the hospital for treat-
ent. Even so some seven or eight days
ter the respondent asked P. W. 3 to
move the child from the hospital. It
opears that P. W. 3 gathered the imp-
ssion that he would have to pay mo-
ey to the respondent for obtaining pro-
er treatment at the hospital. P. W. 3
this background made a request to
e respondent to issue a certificate so
at he could get a loan or advance for
e medical expenses. The respondent
ld P. W. 3 that he would have to pay
sum of Rs 250/-to obtain a certificate
enable him to obtain a loan of Rs.
00/-P. W 3 refused to accede to the
emand Thereupon the respondent
ld him to remove the patient from the
ospital. In view of what transpired,
W. 3 met the respondent on March
3, 1976, and requested him to issue a
ertificate to enable him to obtain a
an from the factory. The respondent
gain told him that he would not issue a
ertificate unless his demand for Rupees
50/-was met. P. W. 3 made entreaties
the respondent but the respondent
id not relent. He told him to remove
he patient from the hospital. There-
pon P. W. 3 promised to the respon-
ent that he would make some payment
nmediately and that the remaining
mount would be paid shortly thereafter

P. W. 3 went back to bring the money. It appears that he felt exasperated and conceived the idea of trapping the respondent at this juncture. He had five currency notes of the denomination of Rs. 10/-with him. He noted down the numbers of these notes and carried the sum with him when he again approached the respondent. The respondent accepted the five currency notes but refused to issue a certificatc unless the remaining amount of Rs- 200/-was paid to him, though P. W. 3 promised to pay the ramaining amount within three or four days, P. W. 3 was thereupon very much annoyed by the attitude of the respondent and he decided to approach the Vigilance Department. He approached the Vigilance Officer and lodged complaint exhibit KA-8 on March 31, 1976. It appears that he had borrowed Rs. 200/-with a view to provide the currency notes for laying a trap. He had carried 20 ten-rupee notes with him. In the complaint lodged by him, Exhibit KA-8, he specified the numbers of the 5 ten rupee notes which he had already given to the respondent on the earlier occasion, the numbers of which he had noted down previously. He also specified the numbers of the 20 ten-rupee notes provided by him at the time of the lodging the complaint. The Superintendent of the Vigilance Department Shri I. P. Bhatnagar, called his Deputy, Dy. S. P. Pandey, and asked him to do the needful in the matter. Dy. S. P. Pandey asked P. W. 3 to meet him on April 2, 1976 at 5-30 p. m. in Kaushik Park. Meanwhile, Superintendent Bhatnagar contacted the Director Vigilance Department and moved competent authority for the requisite permission. The Commissioer-cum-Secretary of the Vigilance Department, Shri Khodaiji, granted written permission to lay a trap against respondent Dr. Ghosh on receiving the sanction Superintendent Bhatnagar directed Dy. S. P. Pandey to proceed to lay the trap. It is the prosecution case that therafter P. W. 3 contacted Dy. S P. Pandey at Kaushik Park on April 2, 1976 at 5-30 p.m. Two witnessed were called. The-currency notes were handed over to S.W. 1, Inspector Bahadur Singh Initials were made on the 20 G. notes, the notes were treated with Phenolphthalein powder and the plan of the trap was explained to P. W. 3, the public witnesses, and to the members who were to accompany the party.

6. As per the plan, initially, Sham Lal and Thakur Parshad were sent to the consultation room of the respondent on the second floor of residence. What transpired need not be stated as he has not been examined as a witness. After Sham Lal returned, P. W. 3, alongwih P. W. 2 Constable Bachu Lal, entered the Consultation room, P W. was in plain clothes and had posed as the elder brother of P W. 3 When both of them entered the Consultation room, respondent enquired from P. W. 3 whether he had brought the money. P. W. 3 then handed over the 20 ten-rupee notes which had been treated with the powder and the numbers of which had been noted down in the complaint against the respondent. The respondent took these notes in hands and placed the same in the left front pocket of his bush-shirt Thereafter the respondent took the form on which he was to issue the certificate from P. W. 3 and started filling in the details. The form was a typed one and there were blank space which were required to be filled in. The typed portion appeared as under :

Certified that Shri/Km.———— D/o Shri——————————..—— of ORDNANCE PARACHUTE FACTORY, Kanpur has been admitted in the Hospital for the treatment of——— He will stay in Hospital for——days. The anticipated expenditure likely to incur is Rs ———Shri———is recommended to draw Medical Advance of Rs.—— ——from————————from his employer.

STATION KANPUR MEDICAL OFFICER.
DATE :

7. The respondent filled in the name of the patient in the first and mentioned her age (Ramsri, 13) in his own hand by pen. He also mentioned the name of P. W. 3 (Babu Lal) in the relevant column in the second line. In the fourth line in the blank space he mentioned the name of the disease (T. B. Lef. Hip) He also mentioned the date of admission in his own hand (18-2-76). Having filled in these blanks he was about to fill up the blank in the fifth line for mentioning the number of days for which the patient was retai-

ned in the hospital and to mention the estimated amount of expenditure and to fill up the details in the remaining columns. At this juncture, it is the prosecution case, the members of the raiding party carried out the raid in the wake of a signal given by P. W. 2 Bachu Lal as per the instructions given at the time of arranging the plan. Since the respondent was interrupted when he was filling up the blanks, he could not complete the form and make his signature. The half-filled certificate form, Ex. KA-5, was seized in the presence of the public witnesses. The respondent was asked if he had accepted money from P. W. 3. The respondent hereupon took out the 20 ten-rupee notes from his pocket and handed over the same to Dy. S. P. Pandey. The numbers of the currency notes were tallied with the numbers mentioned in complaint, Ex. KA-3, and incorporated in Farad Ex. K-A1. The currency notes were placed in an envelope which was sealed. The hand of the respondent was washed in a cup of solution of Sodium Carbonate in the presence of the witnesses. The solution turned red. The purse of the respondent was searched. The bush-shirt put on by the respondent Ex. KA-22, was also seized and a part of the bush-shirt was washed in a solution which thereupon turned red thereafter Dy. S. P. Pandey made enquiry about the 5 ten-rupee notes given by P. W. 3 on the earlier occassion and carried out the search of the living room of the bungalow which was on the first floor. It is the prosecution case that the respondent provided the key of the almirah. It was in the living room and the almirah was opened with that key. Two ten-rupee notes were found from that almirah. The numbers of these notes were tallied with two of the five numbers specified in Complaint KA-8. These notes were also seized and were placed in an envelope which was sealed. Meanwhile, the respondent had fainted. The copy of the Farad prepared at the time of the raid was therefore handed over to his wife after obtaining her signature on the Farad in token of the receipt of the copy thereof. Thereafter the investigation was taken over by P. W. 6 Dy. S. P. Tripathi of the Vigilance establishment who interrogated the witnesses concerned and recorded the statements in the course of the investigation. The sanction for prosecuting respondent Dr. Ghosh was obtained from the Government of U. P and the charge-sheet against the accused was submitted in due course. At the trial Dr. S. P. Pandey could not be examined because he was not alive at the relevant point of time (he was killed in the course of an encounter with dacoits before the trial commenced). Out of the two public witnesses one, P. W. 5 Ram Singh, has been examined. The other public witness Thakur Prasad has not been examined as his evidence would have been of a repetitive nature. Sham Lal was not examined on the ground that he had been won over by the defence. Apart from complainant. P. W. 3 Babulal, three of the members of the raiding party viz. P. W. 1 Bahadur Singh, Inspector Vigilance Department, and P. W. 2 Constable Bachu Lal who had posed as the brother of P. W 3 and had accompanied him when he entered the consultation room, were examined at the trial. The defence examined five witnessess Though the respondent did not himself enter into the witness box to give evidence on oath, he was interrogated u/s. 313 of Cr. P. C. He made his oral statement in the Court and also submitted a written statement in order to explain the circumstances appearing against him.

8. The learned Special Judge excluded from consideration the evidence of P. W. 5 Ram Singh in view of the criticism levelled by the defence in regard to his selection. The learned Judge however considered the evidence of P. W. 3 complainant Babulal as reliable. He also relied upon the evidence of P. W. 1 Inspector Bahadur Singh and P. W. 2 Constable Bachulal. Taking into account the totality of the evidence including the direct evidence and the circumstantial evidence (which inter alia conisted of the seizure of the incomplete form, kA-5, from the consultation room of the respondent at the time raid) and the explanation offered by the respondent in regard to various circumstances appearing against him, the learned Special Judge reached the conclusion that the prosecution had established beyond reasonable doubt that the respondent had demanded and accepted illegal gratification. The learned Specical Jndge thereupon convicted the respondent for the offenc under S. 16, IPC as also for th offence under S 5 (1) (d) of the Prevention of Corruption Act. He impose a substantive sentence of Rigorou Imprisonment for two years and imposed a fine of Rs. 5,000/- (in default t undergo R. I. for four months). Th appeal preferred by the respondend wa allowed in the circumstances mentione earlier in the course of the judgment For the reasons indicated earlier, th judgment rendered by the High Cour is of no assistance and we will have t reach own conclusion as to whether th learned Special Judge was justified i recording the finding guilt an convicting the respondent in the afor said manner.

9, The learned Special Judge wa perfectly justified in making the cautio approach adopted by him in excludin from consideration the evidence of the public witness P. W. 5, Ram Singh. We will have also to do likewise and exclude his evidence from consideratio to be on the safe side. We will have to examine whether the learned specia Judge was justified in recording the finding of guilt on the basis of the evidence, and the circumstances appearing against the respondent, taken along with the explanation offered by him.

10. By and large a citizen is somewhat, rather reluctant than anxious, to complai the Vigilance Department and to have trap arranged even if illegal gratification is demanded by a Government servant. There are numerous reasons for the reluctance. In the first place, he has

to make a number of visits to the office of Vigilance Department and to wait on a number of officers. He has to provide his own currency notes for arranging a trap. He has to comply with several formalities and sign several statements. He has to accompany the officers and participants of the raiding party and play the main role. All the while he has to remain away from his job, work or avocation. He has to sacrifice his time and effort whilst doing so. Thereafter, he has, to attend the Court at the time of the trial from day-to-day. He has to withstand the searching cross-examination by the defence counsel as if he himself is guilty of some fault. In the result, a citizen who has been harassed by a Government officer, has to face all these hazards. And if the explanation offered by the accused is accepted by the Court, he has to face the humiliation of being considered as a person who tried to falsely implicate a Government servant, not to speak of facing the wrath of the Government servants of the department concerned, in his future dealings with the department. No one would therefore be too keen or too anxious to face such an ordeal. Ordinarily, it is only when a citizen feels oppressed by a feeling of being wronged and finds the situation to be beyond endurance, that he adopts the course of approaching the Vigilance Department for laying a trap. His evidence cannot therefore be easily or lightly brushed aside. Of course, it cannot be psaid that it does not mean that the Court should be oblivious of the need for caution and circumspection bearing in mind that one can conceive of cases where an honest or strict Government official may be falsely implicated by a vindictive person to whose demand, for showing favours, or for according a special treatment by giving a go-by to the rules, the officicial refuses to yield.

11. It is now time to deal with the criticism urged as a matter of course in the context of the police officer leading the raiding party—namely that he is an interested witness. This is true, but only to an extent—a very limited extent. He is interested in the success of the trap to ensure that a citizen, who complains of harassment by a Government officer making a demand for illegal gratification is protected and the role of his department in the protection of such citizens is vindicated. Perhaps it can be contended that he is interested in the success of the trap so that his ego is satisfied or that he earns a feather in his cap. At the same it must be realised that it is not frequently that a police officer, himself being a Government servant, would resort to perjury and concoct evidence in order to rope in an innocent Government servant. In the event of the Government servant concerned refusing to accept the currency notes offered by the complainant, it would not be reasonable to expect the police officer to go to the length of concocting a false seizure memo for prosecuting and humiliating him merely in order to save the face of the complainant, thereby compromising his own conscience. The Court may therefore, depending on the circumstances of a case,

feel safe in accepting the prosecution version on the basis of the oral evidence of the complainant and the police officers even if the trap witnesses turn hostile or are found not to be independent. When therefore besides such evidence there is circumstantial evidence which is consistent with the guilt of the accused and not consistent with his innocence, therefore should be no difficulty in upholding the prosecution case. The present appears to be a case of that nature. If the circumstantial evidence is of such a nature that it affords adequate corroboration to the prosecution case, as held by the learned Special Judge, the appeal must succeed. If on the other hand the circumstantial evidence is considered to be inadequate to buttress the oral testimony, the appeal necessarily must fail.

12. Two facts have emerged from the evidence. First, that when the fingers of the accused were dipped in the solution, the liquid turned red, evidencing the presence of phenolphthalein powder on the fingers of the accused. The second feature of the prosecution case is to seizure of an incomplete form of medical certificate which was half filled in the handwriting of the accused himself. It is not disputed that this document was seized by the Investigating Officer. It is not disputed that the certificate is half filled. A part of it is admittedly filled in the handwriting of the accused himself. It is not disputed that when the blanks in the form were being filled the accused abruptly stopped and did not complete the remaining part of the form. Now, the prosecution version is that illegal gratification was demanded by the accused from the complainant (P. W. 3, Babulal) for issuing this medical certificate. It is also the prosecution case that when the agreed amount of Rs. 200/- was paid to the accused he accepted the currency notes and put the same in pocket of his bush-coat. Thereafter, he started filling the form of medical certificate which was to be issued as and by way of consideration for the illegal gratification paid to him. When he was in the process of preparing this certificate, at the point of time when he had filled it partly, the raiding party arrived upon the pre-agreed signal being given. In other words the prosecution case is that it was in these circumstances that a form of medical certificate which was partly filled in by the accused and which was partly incomplete was found on the table of the accused and was seized from his private consultation room. It must be realised that even the most crafty police officer who conspired with the complainant to lay a false case in order to rope in an innocent doctor would not be in a position to obtain a half complete medical certificate partly filled in the handwriting of the accused himself. If the prosecution version is believed, the seizure of the incomplete medical certificate partly filled in by the accused himself leaves no room for doubt that the accusation is true. It is rarely that such a piece of evidence would be available to the prosecution. The fact that the form has been partly filled by the

accused himself is admitted in the statement made by him under S. 313 of the Code of Criminal Procedure. It is an undisputed fact that the medical certificate was being prepared at the request of the complainant by the accused in his own handwriting and that he abruptly stopped mid way and left the form half-filled and incomplete. The prosecution version pertaing to the circumstances in which this situation arose has already been adverted to. The defence version as to (1) the circumstances in which he started preparing the medical certificate in his own writing and stopped abruptly and (2) the circumstances in which the said half completed certificate happened to fall into the hands of the Investigating Officer, must now be scrutinized with a view to find out whether the version passes the test of probabilities unscathed. And with a view to find out whether the explanation offered by the defence, in order to move away the finger of guilt pointed at him by this incriminating circumstance, is good enough. If he outcome is in favour of the defence, the order of acquittal can be sustained. Not otherwise. This is therefore. one of the crucial circumstances on which, in a way the entire case turns.

13 Let us now therefore have a close look at the explanation offered by the accused, which may be quoted verbatim for the sake of preciseness:

"Once after finishing my round I was returning back. At that time Babul came to me and told that in the present days of emergency he was not given leave. He requested me to write only this much in the form that his daughter Ram Shri is under my treatment so that he could have leave for attending his daughter. I replied that I will come back after performing an operation You place the form on the table and am also calling for Bed Head Ticket. Having returned from operation theatre I started filling the from and found that the form is incorrect, At that time Babu Lal was not present there. I stopped writing the form and kept the same on the table itself. I can't say as to how that form reached to the hands Shri R. N. Pandey. This form is Ex. KA-5 Shri R. N. Pandey used to come to Shri B. M. Pandey."

14. The explanation offered by the respondent does not carry conviction and appears to be highly improbable. The respondent could not have been unaware of the form in which the certificate was to be issued. The form presented to him was a typed form (it has been reproduced to extenso in the earlier part of the judgment) containing about eight lines with blank spaces which were required to be filled up. He would have immediately realised at a bare glance that it was not the proper form before starting to fill up the form. In and event if he had realised that the form was not a proper form after filling up four gaps, he would have at least conveyed to P. W. 3 that he could not issue the certificate in that form. It is not even his case that he did so. Besides, there was no point or purpose in

keeping the half filled form on his table. Why should he have preserved it at all? It is inconceivable why he should preserve that half filled form and keep it in his office room on the hospital premises so that it can somehow make its way in the hands of the police. It is also difficult to understand how any one would know about the existence of this form, steal it, and pass it on to P. W. 3 or to the police officere so that it could be readily used in order to weave it in the story pertaining to what transpired at the time of the raid. The respondent himself is unable to explain how the half filled form which was lying in his office room in the hospital made its way into the hands of the police officers. Again, it will have to be assumed that the police officers from the very beginning knew that the respondent would not accept the currency notes from the complainant and they would have to 'frame' him by preparing a Farad in which false recitals regarding seizure of the form were to be incorporated. One does not come across such coincidences in the ordinary course of life. On probailities is well-nigh impossible to believe that so many coincidences could have occurred namely (1) the respondent could not realise that the form was not a correct form till he had filled up the particulars relating to the name of the patient, the date of the admission of the patient (whih would have to be ascertained from the record) and the ailment from which the patient was suffering. (2) It is also difficult to visualize at that point of time on realizing the mistake, instead af tearing 'off,' the form, he would preserve the half completed form, and would go away from the office keepig it on the top of the table, so that some one could conveniently take it away. (3) That such a form should conveniently fall into the hands of somebody enimical to him who could do quick thing, conceive a design to trap him and preserve it for future use to implicate him and (4) that such a person would know PW 3 and the police officers and pass it on to them to use it to 'frame' the respondent. Nobody could have known that such a form would be lying on his table. Even if any member of the staff had found it on the table he would not have realised that it could be utilised for trapping the respondent throngh PW 3. It is too much to believe that someone interested in framing the respondent had an easy access to his office room, could enter his office room in the absence of the respondent, and take away such a paper lying on his table. And that such a person would contact PW 3, Babulal and the police officers, and plant in their mind the idea that this document could be availed of for framing the accused. It does not happen in real life. On the other hand the prosecution version is very natural and probable. The story regarding the demand for Rs. 200/- was mentioned in complaint Ka 14 which was forwarded by the Vigilance Commissioner to the Government for obtaining sanction. The evidence of PW 3, Babulal, and the evidence of PW 2, Police Constable Bachu Lal, who accompanied him goes to show that as soons as the currency notes were handed over by PW 3 to the respondent he started filling up the form. It was at that point of time that the signal was given and the raid materialized. The respondent was caught red handed while actually engaged in filling up the form, now that his demand was met. The from was seized under a Farad and a copy of this Farad was handed over immediately to the wife of the respondent after obtaining her signature on the original Farad in token of having received the copy. This would go to show that there was no room or scope for any manipulation after the police officer left the consultation room of the respondent after the raid. It was but natural for the respondent to start filling up the form as soon as the amount demanded by him was paid. The fact that had ad to stop in the midst when he was engaged in completing the from provides a very strong corroboration in the version of PW 2 and PW 3. And when this evidence is weighed in the light of the explanation offered by the respondent, which fails to carry conviction and sound extremely improbable, the circumstatial evidence provided thereby assumes very great importance. The learned Special Judge was therefore perfectly justified in attaching great importance to this piece of circumstantial evidence. As discussed earlier, it is very difficult to believe that PW 3, a poor mill worker would go to the length of framing a Medical Officer of the Hospital where his child was taking treatment. On probabilities it is not possible to believe that be would go to the length of securing currency notes to the tune of Rupees 200/- to provide the same to the police officers for arranging the trap, and to expose himself to the hazards of becoming a witness in a criminal trial, just in order to rape in the respondent against whom there was no personal enmity. On the other hand, it is understandable if he was exasperated when he felt that his child was being denied proper medical treatment by the doctor who insisted on illegal gratification under one pretext or another And on account of the strong feeling of injustice it was understandable if he lodged a complaint with the Vigilance Department out of exasperation. The respondent has no other explanation to offer except and save to the effect that PW 3 must have done it at the instance of one of his ambitious colleagues who was junior to him. This is what the respondent says in his statement in this connection :—

> "Baboo Lal had gone wrongly under this impression that his daughter had not been benefited by the treatment.
>
> When she was brought in the hospital her condition was most precarious and was unable to speak. She even was not in a position to tell her grief. The treatment recovered her to this extent she regained her senses and was able to talk and cry about her pain and grief.
>
> Having regained sensibility she started feeling paid and she used to cry. Baboo Lal hardly used to meet me. I could see him in the hospital only once. Whenever I went to check this patient at the time of round Baboo Lal never

was there. He never gave me this opportunity to convey him that how much the patient hes been benefited and recovered by the treatment. Baboo Lal used to come at evening and used to return back after meeting with doctors. Dr. B. M. Pandey who was my immediate junior used to sit in my office in my absence because we both had a common office. Dr. S. P. Bhatnagar Pathologist had checked Kumari Ramsri and his report is present in the file. Dr. B. M. Pandey and Dr. P. Bhatnagar were close friends. S. P. Bhatnagar of Vigilance Department is related to Dr. I. P. Bhatnagar. Dr. B. M. Pandy and R. D. Pandey, Director Vigilance are both residents of Distt. Basti are collaterals in family.

Once Dr. B. M. Pandey had attempted to dislodge me from U.H.M. Hospital and suddenly I got a transfer order. All the ministers, M.L. As. and Dy. Ministers who were Pandey's were in the back of Shri B.M. Pandey. My transfer was stayed by the Court. Meanwhile Dr. B. M. Pandey was posted in my department.

Dr. B.M. Pandey was posted on run way duty. He was (sic) not (sic) of beds, but he had raised a dispute regarding allotment of beds. Thereafter Dr. R. Shingal told me that he had been pressurised too much and he allotted ten beds of the verandah to Dr. B. M. Pandey. But B. M. Pandey was not allotted any bad in the family ward. These beds of family ward remained under me. It might be possible that Baboo Lal usually visited there and had meetings with Dr. Pandey."

15. So also, it is not possible to believe that all the police officers had from the beginning conspired to rope in the respondent by hook or crook and had carried with them the half complete form which was acquired in a fortuitous manner to the consulting room in order to prepare the fictitious Farad at the time of the raid. It is not possible to believe that nothing had transpired at the raid, and yet, an imagined account of the occcurrence and the seizure was incorporated in the Farad with a view to falsely implicate the respondent. The explanation of the respondent as to why the police officers should have falsely implicated the respondent is also not convincing. This is what he says :

"A person by the name of Nathu had died in police lock up at Hahi Police Station. In that case Shri R. K. Shukla and other police officials were involved. A vast enquiry was done in that case. The post-mortem of the dead body of Nathu was performed by me. On that day Shri R. N. Pandey met me and pressurised me to give post-mortem report to the effect that no reason could be ascertained of causing death. I told him that whatever will be right and truth I would be giving the same in my report. Shri R. N. Pandey told me that enemity with police is not good. About 18-20 police employees were suspended on my report. That case is still pending against the police officials. I had performed the post-mortem in December, 1974 and the revenge of the same was taken during emergency by Shri R. N. Pandey while having league with Dr. B. M. Pandey by laying a trap on me. Babco Lal was made a willing stooge."

16. The incident was a relatively stale one and it is highly improbable that the entire police force would nurse a grievance on this score and wait for such an opportunity. Bet it realized that the child of PW 3 was genuinely afflicted with bone T. B. and was a genuine patient at the hospital The defence version is therefore altogather improbable. The fact that the fingers of the respondent were dipped in the solution and the solution turned into red indicating that the fingers had come in contact with phenolphthalein powder is not disputed by the respondent, but he does not offer any explanation This is all that he says :

"O. No. 11 : It has come in the the shirt from which currency notes evidence that your fingers, pocket of were recovered were both separately dipped and washed in the solution of Sodium Corbonate. The colour of the solution turned red. Both the solutions were sealed in separate bottles which are Ext. 24 and Ext. 25. What you have to say in this regard ?

Ans : I can't say of what contents this solution was prepared. When my fingers were not dipped in that solution the colour of the same turned red. My bush-shirt had been made to put off by me. In my presence the pocket of the bush-shirt was not dipped in the solution. I don't know whether they had sealed this red solution in bottles or not."

17. Taking an overall view of the evidence of PW. 1, PW. 2, PW, 3 and the circumstantial evidence, it is not possible to believe that the raid had proved abortive and yet everyone conspired together in order to falsely rope in the respondent,

18. Counsel for the respondent contended that it was not probable that PW 3 would agree to pay Rs, 250/- in order to secure a loan of Rs, 500/-. It must be realised that the amount which was being demanded was in the background of the fact that the complainant felt that his child was not being given proper treatment and unless money was paid to the respondent his child would not get proper treatment. Nor can one be oblivious of the evidence of PW 3 to the effect that he was being asked to remove his child from the hospital even though she had not recovered. Evidently the request for the issuance of the certificate merely provided an opportunity which was seized upon by the respondent for making PW 3 yield to his demand. Again, the complainant had no option but to agree to give the amount demanded from him or to lay a trap, having regard to the fact that he was feeling that his child would not get proper treatment unless the demand was acceded to. If the complainant was interested in inventing a story nothing could prevent him from inventing the story to the effect that the demand was being made for a smaller amount of say Rupees 50/- or so. This circumstance

therfore cannot detract from the overall effect of the testimony of PW 3 Baboo Lal and PW 2 Bachu Lal who were present at the time of raid and the clinching circumstance as regards the seizure of the certificate which was admittedly filled in partly by the respondent in his own hand. The evidence of PW 1 and PW 2 as also of PW3, thus stands fully corroborated by the the circumstantial evidence which lends assurance to it. Under the circumstances the finding of guilt and the order of conviction recorded by the learned Special Judge was unexceptionable. The High Court, as we pointed out earlier, set aside this finding under a serious misconception on an altogether untenable reasoning, which even the counsel for the respondent has not been able to support.

19. Turning to the question of sentence, having regard to the fact that the respondent had to undergo the tension of a pending trial and a pending appeal for six years, and the fact that it will have adverse impact on his employment after 23 years of service, no useful purpose would be served by imposing a long term of jail sentence. The substantive sentence of two years' R. I. is therefore, reduced to one of 6 months' R.I. The appeal is accordingly allowed, the order of acquittal rendered by the High Court is set aside, and the finding of guilt and the order of conviction recorded by the learned Special Judge is restored, but the sentence is modified to the aforesaid extent. The respondent shall surrender to bail in order to undergo the substantive sentence imposed on him.

Appeal allowed.

Report No. 101, p. 01

D.A. Desai
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Art. 14—Dismissal of several members of Police Force for participation in agitation—Reinstatement of large number of personnel—Petitioners though similarly situated—Discrimination.

OBSERVED BY

D. A. Desai and
O. Chinnappa Reddy,

Hon'ble Judge, Supreme Court of India

IN

Civil Appeals Nos. 3183-3184 of 1983 decided on 2-8-1983, between Sengara Singh and others etc., Appellants v. The State of Punjab and others, Respondents.

TEXT

Order :— The appellants in these two appeals were members of the Police Force in the State of Punjab belonging to various ranks such as Constables. Head Constables, Assistant Sub-Inspectors and Sub-Inspectors of Police. There are 52 appellants in the cognate Appeal. Thus we have before us the case of 117 persons

2. To begin with, the factual matrix. Dissatisfaction about the conditions of service of members of the Police Force in the State of Punjab led to an agitation which at its height was in the form of a procession and some demonstration. The State of Punjab initiated disciplinary action and dismissed about 1100 members of the Police Force on the ground that they had participated in an agitation which was impermissible under the rules governing the discipline in the Police Force of the State of Punjab. A number of criminal prosecutions were filed against the participants in the agitation. Some of the members of the Police Force who were dismissed from service filed writ petitions in the High Court of Punjab and Haryana, but they were dismissed. It appears that after the dismissal of the writ petitions about 1000 former members of the Police Force were reinstated and criminal cases pending against some of them were withdrawn. In this behalf the submission of the State of Punjab is that a Committee cosisting of members of the superior rank of the Police Force was constituted by the State Government to review the cases of the dismissed agitators and reinstatement followed on the recommendations of the Committee. We will have occasion to revert to this aspect of the matter latter on. The Committee consisted of Director Gene-

ral of Police, Deputy Inspector General of Police, CIB, Assistant Inspector General of Police (Admn) and Superintendent of Police of the District to which the dismissed members of the Police Force belonged. It is conceded that of 1100 dismissed agitators 1000 were reinstated and the rest were left to fend for themselves. Those who were thus weeded out by the Committee filed writ petitions in the High Court of Punjab and Haryana. A Division Bench of the High Court dismissed the petitions making the following order :

"The petitioners were dismissed from service on account of their participation in the Police agitation, Some of them had been taken back by the Government. The petitioners have filed this writ petition praying that the Government should also consider their cases. It is not disputed that some of the Constables filed writ petitions which were dismissed vide judgment reported as ILR (1980) 2 Punj & Har, 122. After hearing the learned Counsel for the parties, we do not find any merit in the petition and consequently dismiss the same in limine".

3. With the best of our efforts and with the assistance of Mr. D D. Sharma, learned counsel for the State of Punjab we unsuccessfully tried to understand the decision of the High Court. The decision is ILR (1980) 2 Punj. & Har. 122 was given much prior to the constitution of the committee on whose recommendations 1000 former members of the Police Force were reinstated. The situation had undergone a sea change since the decision and the contention was entirely different and, therefore, we consider the reference to the earlier decision in apposite. If the petitions were dismissed following the decision, which was entirely irrelevant, we are of the opinion that the High Court had completely misdirected itself in examining the contentions raised before it. The dismissal of the writ petitions by a laconic order by the High Court necessitated the examination of the case of the appellants by us in depth.

4. Mr. D. D. Sharma, learned counsel was at pains to point out that the State Government cannot be charge with picking and choosing or distributing its largesse in reinstatement some of the dismissed members of the Police Force because a high powered Committee consisting of top brass of the Police Force examined the case of each dismissed person and on its recommendations the State Government took the decision to reinstate some and not to revoke the order of dismissal of the rest including the present appellants. The High Court in its short order does not refer to the constitution, deliberations or recommendations of this Committee. We have our grave doubts whether the report of the Committee was ever disclosed to the High Court. At any rate in the counter-affidavit filed by Mr. K. K. Attri, IPS Assistant Inspector General of Police, Chandigarh in this Court, he has referred to the constitution of the committee to review the cases of dismissed members of the Police Force. But

there is no whisper in this counter-affidavit as to what yardstick was applied by the Committee and on what material the cases of the present appellants were distinguished from those who became the beneficiaries of the Committee's largesse. The only reference to the work of the Committee is in part 5 of the counter-affidavit wherein it is stated that after the dismissal of the writ petitions (earlier writ petitions) filed by the dismissed employees, the Government constituted a Committee of senior officers to review the case of dismissed Police employees and on the recommendations of this Committee some dismissed Police employees have so far been reinstated. In fairness to the appellants, and to the Court not only the report of the Committee should have been disclosed to this Court but the deponent should have stated in his affidavit the criteria adopted by the Committee for distinguishing the cases of dismissed police employees from one another and how the present appellants fell on the other side of the line. The affidavit is conpicuous by its silence on this most relevant aspect

5. Mr. D. D. Sharma, learned counsel, however stated that he has got the report of the Committee with him and is prepared to produce the same with an affidavit when the hearing of the appeals was in progress. What prevented the State Government to produce this report before the High Court and on an earlier occasion before this Court? In this connection, it may be pointed out that by the order of this Court made on March 11, 1983 special leave to appeal was granted to the appellants. The Court further dispensed with preparation of record and filing of statements of case and also security deposit was dispensed with. The Court specifically directed that the appeals be listed for hearing in August, 1983. The State Government had five months for producing the report as well as other documents. And, let it be recalled that before granting the special leave to appeal the State was already served with a notice issued by this court to show cause why special leave should not be granted. This order was made as far back as November 5, 1982. Add to this the fact that Mr. Attri filed his counter-affidavit on Jan. 27, 1983. Yet for a period of seven months the report of the Committee did not see the light of the day. We are of the view that the inflow of the documents should at least be stopped when the hearing is in progress. Overlooking the laxity in this behalf puts the other side to imemediable disadvatage and the hearing may have to be adjourned which would totally upset the working of the Court. We, therefore, decline to take the report on record in the course of the hearing.

6. We, however, requested Mr. Sharma to tell us what criteria or guidelines or yardsticks were adopted with reference to which the case of each dismissed agitator was examined and the reasons why the cases of the present appellants fell on the other side of the line. We asked one more question as to why

this distinguishing feature in respect of the present appellants treating them differntly from others similarly situated was not set out in the counter affidavit. There was little or no convincing reply.

7 What then is the situation? As a sequel to police agitation, the State Government dismissed about 1100 members of the Police Force on the allegation that they participated in the agitation. The State Government also filed criminal prosecutions against a large number of the agitators. Subsequently, the State Government reinstated 1000 dismissed members of the Police Force in their original posts and withdrew the criminal case against them. If the filing of the criminal cases was distinguishing feature, which would distinguish the case of the present appellants from others, that feature has become irrelevant because the criminal cases against those who were subseqeuntly reinstated have been withdrawn. It is not suggested that the present appellants were leaders or indulged into more violent activities. We repeatedly questioned the learned counsel to specify the distinguishing features of the present appellants from those in whose cases the Committee recommended the reinstaement and the State Government accepted the recommendations. There is not an iota of evidence which would distinguish the case of the present appellants from those who were the beneficiaries of the indulgence of the Committee and the largesse of the State. The net result has been that the present appellants have been arbitrarily weeded out for discriminatory and more severe treatment than those who were similarly situated. This discrimination is writ large on the record and the Court cannot overlook the same.

8 As usual the bogey was raised that this Court should not encourage indiscipline in ranks of para-military forces like the police because that will tinker with national security. We asked Mr. Sharma, learned counsel whether the charge should be addressed to the Court or to the State Government. The High Court dismissed the petitions on an earlier occasion probably guided by this consideration. The State Government thereafter constiuted a Committee to review the cases of all dismissed agitators and the Committee picked and chose some for its indulgence leaving the rest to fend for themselves. May we repeat the question as to who would be responsible for creating such situation and encourage indiscipline in the Police Force ? The State or the Court. The State divided the agitators into two classes i. e. favourites and nonfavourites. The Court is restoring the balance by this order. Therefore, the charge misdirected at the Court must be ignored.

9. What then should be done ? The appellants have been accused of participating in a procession taken out by the members of the Police Force for ventilating their grievances about their service conditions. May be that still having not reached the stage to tolerance for formation of associations amon-

:t police personnel, the demonstrators ay be looked upon with disfavour. ut approaching the matter from this ngle, all the 1100 dismissed member of ie Police Force were guilty of same isconduct namely indiscipline to the ime extent and degree as the present ppellants. Now if the indiscipline of a rge number of personnel amongst dis- issed personnel could be condoned or verlooked and ofter withdrawing the iminal cases against them, they could e reinstated, we see no justification in eating the present appellate differently ithout pointing out how they were uilty of more serious misconduct or ie degree of indiscipline in their case as higher than compared to those ho were reinstated. Respondents iled to explain to the Court the disti- guishing features and, therefore, we are itisfied in putting all of them in same racket. On that conclusion the treat- ient metbted to the present appellants iffers from the vice of arbitrariness and rt 14 forbids any arbitrary action hich would tantamount to denial of quality as guaranteed by Art. 14 of the onstitution. The Court must accor- ingly interpose and quash the discrimi- atory acton.

10. Before we conclude we must otice, a submission of Mr. D. D. Shar- ia, learned counsel for the State of unjab to the effect the only prayer of ie appellants in the High Court was iat their cases having not been consi- ered by the Committee, the Committee iay be directed to consider their cases nd thus the Court cannot grant any other relief. We remain unimpressed. The prayer with which the petitioners approached the High Court reads as under :

"Issue a writ of mandamus commanding respondents to consider the cases of the appellants also objectively and dispassionately and thereafter take them back into service of the Police Department as they had taken back persons who were similarly situated and who also took part in the police agitation in 1979."

11. Is there any doubt about the relief sought by the appellant ? They sought reinstatement on the ground of equality of treatment with persons similarly situated. The prayer for reconsideration of the case was a step to be taken for reinstatement. We, therefore reject the contention of Mr. Sharma, learned counsel that we should remit the case to the High Court.

12. Logically the appellants must receive the same benefit which those reinstated received in the absence of any distinguishing feature in their cases. Accordingly, the appellants would be entitled to reinstatement in service. Therefore, both the appeals succeed and are allowed and the order of the High Court dismissing the writ petitions is quashed and set aside. The State of Punjab is directed to reinstate the appellants subject to the same condition set out at annexure P–II subject to which the other dismissed personnel of the Police Force were reinstated. They should be reinstated as directed herein forthwith from today. Their services sho-

D. A. Desai
Judge
Supreme Court of India

uld be treated as continuous and the period between the date of the dismissal and the reinstatement shall be treated as leave if available and admissible or leave without pay if leave of any kind is not available. To the extent they are treated as on leave they should be pai leave salary. Respondents shall pa cost of the appeals in both appeals quantified at Rupees 2500/- in each case.

Appeale allowed

D. A. Desai
Judge
Supereme Court of India

OBSERVATION

Constitution of India, Arts. 311, 16—Memo No. O/66/II-233-1938, D/-30-1-1940—Seniority—Determination—Confirmation following initial officiating appointment—Officiating service rendered prior to approval cannot be ignored unless contrary rule is shown—Khandsari Inspectors—Provisional seniority list drawn from date of approval of their appointment by Public Service Commission, held, was invalid.

OBSERVED BY

D. A. Desai and A. P. Sen

Hon'ble Judges, Supreme Court of India

IN

Writ Petns. Nos 5105-13 of 1983. Decided on 18-7-1984 between G. P. Doval and others, Petitioners v. Chief Secretary, Govt. of U. P. and others. Respondents.

TEXT

Desai J.:—The petitioners in this group of petitions under Art 32 of the Constitution were inducted as Khandsari Inspectors between March 1960 and 1964. Respondents 4 to 19 were also recruited as Khandsari Inspectors on different dates. Respondents 1 and 2 are the Chief Secretary, Govt. of U.P. and the Secretary, Industries respectively of the U. P. Government and respondent No. 3 is the Sugar Commissioner of U. P. The dispute amongst the petitioners and the respondents 4 to 19 is about inter se seniority between them in the cadre of Khandsari Inspectors.

2. It appears that in the year 1958-59, the State Government framed what is styled as Khandsari Licensing Scheme' to regulate the supply of sugarcane to sugar factories by G. O. No. 4588(1) XVIII-A-680/59 dated November 21, 1259 Posts of Khandsari Inspectors initially designated as Licensing Inspectors were created in the pay-scales of Rs. 120-250. Petitioners Nos. 1, 2 and 3 were appointed as Khandsari Insppectors between March and May, 1960. Thereafter some of the respondents were recruited as Khandsari Inspectors and some others who were recruited departmentally were approved by the Public Service Commission. On March 22, 1971, the third respondent—the Sugar Commissioner circulated a provisional seniority list of Khandsari Inspectors. The grievance of the petitioners is that some of the petitioners have been assigned lower place in the seniority list even though they were recruited earlier and have been continuously in service. To illustrate petitioners pointed out that petitioners 1 to 3 have

been placed at Serial Nos. 25, 29 and 27 respectively though all of them were recruits of 1960 while respondent No. 7—J. S. Negi who was recruited on March 23, 1961 was assigned the place at Serial No. 15 and respondent No. 4 O. N. Chaturvedi, who was recruited on March 23, 1961 was shown at Serial No. 6. Similarly, respondent No. 9—P. N. Rai, who was also recruited on March 23, 1961 was shown at Serial No 17 and respondent No. 5 was shown at Serial No. 8. The petitioners further pointed out that petitioners Nos. 4, 5, 6, 7 and 8, who were recruits of 1961 been assigned places. 30, 34, 42, 35 and 31 respectively while recruits of 1963 have scored a march over them in the provisional seniority list. The petitioners assert that when the recruitment was made in the year 1960, the post of Khandsari Inspector was not within the purview of the Public Service Commission and that they were regularly recruited to posts which were temporarily sanctioned and indefinitely continued till today and therefore, in reckoning the seniority, they must be given the benefit of the length of continuous officiation. They further contend that when the post of Kandsari Inspector was later brought within the purview of the Public Service Commission, the names of the petitioners who were already recruited in service as also of some of the respondents were forwarded to the Public Service Commission for approval and except petitioner No 9—S.P. Gupta, the names of rest of the petitioners were approved by the Public Service Commission on September 30, 1963, the relevant date in the case of petitioner No. 9 is April 14, 1978. The petitioners assert that even assuming that their appointment would be regular after aproval of the Public Service Commmission, yet once such approval is granted, it would relate back to the date of appointment and the previous length of service cannot be ignored or denied in computing their seniority in the absence of any statutory rule or administrative instruction which has the force of law. The petitioners further aver that in the absence of any other statutory rule or administrative instruction for determining seniority, length of continuous officiation provides a valid principle for determining seniority. Viewed from this angle, petitioners 1 to 3 would be senior to all the respondents and the placement of the remaining petitioners vis-a-vis the respondents will have to be recomputed. On the circulation of the provisional seniority list, the petitioners submitted various representatations pointing out the error in drawing-up the provisional seniority list but till this day no reply was given nor any final seniority list circulated nor reasons assigned for rejecting the representations. The petitioners further say that despite their representation, respondets 1, 2 and 3 are operating the tentative seniority list for making furher promotions to the post of Khandsari Officer and Assistant Sugar Commissioner and these by they are being denied equality of opportunity in the matter of promotion. The petitioners accordingly questioned by there writ petitions the validity and legality of the provisional seniority list asserting that as the final seniority list is not being drawn-up and as the representations are being ignored and yet the provisional seniority list is being operated to the disadvantage of the petitioners thereby denying them equality of opportunity in the matter of promotion which action of the respondents 1 to 3 is violative of Arts. 14 and 16

3. Kailash Narain Pandey, Additional Sugar Commissioner filed affidavit-in-opposition. It was admitted that by the Govt. Order dated November 21, 1959 temporary posts of Licensing Inspectors later redesignated as Khandsari Inspectors in the pay scale of Rs. 120-250 were created but according to him as the maximum of the scale was over Rs 200 right from its inception, the post was within the purview of the Public Service Commission in view of Regulation 5(a) of Appointment Department Misc. No. 99/II-B-151-60 dated January 29. 1954 issued under the Uttar Pradesh Public Service Commission (Limitation of Functions) Regulations, 1954. It was then stated that on the framing of the Khandsari Licensing Scheme, it became necessary to urgently appoint Inspectors to implement the scheme and therefore, the third respondent—Sugar Commissioner as Appointing Authority pending regular selection through open competition by the Public Service Commission proceeded to make appointments and the appointment of the petitioners were of a stop gap or ad-hoc nature and that it created no right to the post. It was admitted that petitioners Nos. 1 and 2 were recruited after holding departmental competitive test on March 4, 1960. Petitioner No. 3, who was then working as a Clerk in Cane Union Federation Ltd., Lucknow was selected on May 24, 1960 by applying a weeding out test. Petitioners Nos. 4 to 8 were recruited after holding qualifying test and interview on 23rd March, 1961 and Petitioner No 9 was appointed as and by way of stopgap arrangement. It was contended that the petitioners were appointed on an ad hoc and temporary basis as a measure of stopgap arrangement. It was conceded that all the petitioners except petitioner No. 9 were approved by the Public Service Commission for regular appointment in the year 1963, to be specific on 30th, September, 1963 and they have continued, uninterruptedly in the posts of Khandsari Inspectors. It was further averred that within a period of one year and seven months from the date of appointment of the petitioners, the State Public Service Commission selected candidates to replace the already working unapproved Licensing Inspectors on the request of the Department and sent a list of approved candidates on September 14, 1961 but only 5 out of 44 such selected candidates joined and hence the Department has to permit the petitioners to continue though according to the third respondent notices of termination of service were served on some of the petitioners. It was further pointed out that when the State Public Service Commission proceeded to recommend candidates for the post of Khandsari Inspectors, some of the petitioners applied for such posts, but their applications were rejected at the stage of scrutiny. But on a

request from the Department the State Public Service Commission entertained the applications, called the petitioners for interview and approved them. It was admitted that except Petitioner No. 9 all the rest of the petitioners were approved by the Public Service Commission on September 30, 1963 Justifying the drawing-up of the tentative seniority list as being based on recommendations of Public Service Commission, it was said that the service which can be taken into consideration for determining the length of continuous officiation must commence from the date of substantive appointment and accordingly the provisional seniority list has been drawn-up keeping in view the date of approval by the Public Service Commission in respect of each candidate. It was averred that if this principle is valid for the purpose of Art. 16, there is no error in drawing-up the seniority. It was specifically stated that it was open to the Government to ignore officiating service or service rendered on appointment in an ad hoc or stopgap arrengement. It was broadly stated that before a man can claim to have his seniority determined in the cadre, he must belong to the cadre and he can only enter the cadre on substantive appointment.

4. The rival contentions would bring into focus the controversy between the parties. The impugned provisional seniority list dated March 22, 1971 is drawn-up on the length of continuous officiation determined by the date of selection/approval of each person by the State Public Service Commission. In the process service prior to the approval by the Public Service Commission is wholly ignored while reckoning seniority with the result that the recruits of 1961 have scored a march over those who were recruited earlier in the cadre and have been uninterruptedly officiating in the post and who at a later date were approved by the Public Service Commission for appointment as Khandsari Inspectors. The question is : where on account of exigencies of service, recruitment to a post within the purview of the Public Service Commission is made by the appointing authority, but at a later date the Public Service Commission puts its seal of approval on such an appointee, whether the continuous and uninterrupted service rendered by such appointee prior to the approval by the Public Service Commission can and should be taken into computation while determining seniority based on the principle of length of continuous officiation ?

5. When a seniority list is challenged as being violative of the guarntee of equality enshrined in Arts. 14 and 16 prima facie it appears that those who came into the cadre later on scored a March over those who were already in the cadre, it would be for the authority justifying the seniority list to plead and point out the rule for determining seniority on the basis of which the list is drawn-up. If any such rule is pleaded, it would be for those impugning the seniority list to over and establish that the alleged seniority rule is violative of the fundamental rights guaranteed by Arts.

14 and 16

6. In the affidavit-in-opposition filed by the Additional Sugar Commissioner on behalf of respondents 1 to 3 it was asserted that the impugned seniority list of the Khandsari Inspectors was drawn-up on the principle of the length of continuous officiation reckoned from the date of selection/approval by the Public Service Commission in respect of each employee belonging to the cadre. It is necessary to refer to this aspect because the averment is vague and of a general nature and later on at the hearing of the petitions reliance was placed on Memo No O-66/II-233-1938 dated January 30, 1940 (1940 Ordeer' for short) for sustaining the seniority list, the affidavit being conspicuously silent with regard to this order. There is not a whisper of the 1940 Order in the whole of the affidavit-in-opposition. However, if the respondents would be in a position to justify the seniority list on any existing statutory rule or administrative instruction which has been invariably followed, it would not be proper to attach too much importance to the vagueness in drawing-up pleadings, shifting the stand in the course of the proceedings. It must, however, be made clear that Mr. Gopal Subramaniam, learned counsel who appeared for respondent Nos. 1 to 3 attempted to reconcile the averments in the afidavit and the oral submissions made at the hearing of the petitions by urging that when it is said in the affidavit that the seniority in respect of each member of the cadre was reckoned on the principle of length of continuus officiation commencing from the date of selection/approval of each member by the State Public Service Commission, respondents 1 to 3 had the 1940 Order in mind.

7. It is therefore, necessary first to examine the nature and character of the 1940 Order and whether it lays down either by way of a statutory rule or administrative instruction a binding rule of seniority for determining the seniority in the cadre of Khandsari Inspectors. If it does, it will have to be further ascertained whether upon its true construction, the relevant rule excludes any service rendered by a member of the service prior to his approval/selection by the State Public Service Commission.

8. The 1940 Order styled as a Memoranum was not annexed to the affidavit-in-opposition A copy of it was submitted at the time of hearing of the petitions. In its preamble it proceeds to recite that in view of the 'Appointment Department Memorandum No. 233 (1)/II-38 dated July 27, 1939 the Department of Secretariate are informed that under Section 241 (1) (B) and (2)(b) of the Government of India Act. 1935 rules have to be framed for appointment to the civil services and posts and conditions of service of persons serving.' It further proceeds to state that the existing rule for the various provincial specialist and subordinate services under the Government should be revised so as to bring them into conformity with the provisions of the Government of India Act, 1935 and new rule should also be drawn-up for services and posts which existed prior to

April 1, 1937 but for which no rules were framed, or which have been created after that date'. The 1940 Order further recites that enquiries are being received as to the lines on which either the old existing rules have to be revised or new rules have to be framed. It then states that 'the general principles which have been accepted by Government are stated below'. Para 2 of the Order clealy brings out the nature and character of the 1940 Order- the relevant portion of which read as under :

"2. Among other things the rules should provide for the following matters."

At Item No. 11, seniority is mentioned elaborating how the rule about seniority should be drawn-up, the memorandum proceeds to prescribe guidelines as under :

"Seniority in service shall generally be determined from the date of substantive appointment to a service, or from the date of the order of first appointment if such appointment is followed by confirmation. In special cases seniority may be determined in accordance with the conditions which may suit a particular service".

9. After extensively referring to the 1940 Order, it was urged on behalf of the respondents that the impugned seniority list is drawn-up keeping in view the date of appointment the date of selection/approval by the Public Service Commission, which is the relevant date for the purpose of computing seniority under G. O. of 1940 and the date of confirmation by the department and date of promotion.

10. The first equestion is : does the 1040 Order lay down a binding rule of seniority in respect of Khandsari Inspectors ? It may at once be made clear that the cadre of Khandsari Inspectors was first formed under 'Khandsari Licensing Scheme' which was framed somewhere in November 1959. It is difficult to belive that two decades earlier, a seniority rule for a future cadre was prescribed. It is of course open to the Government to lay down general conditions of service governing all services in the State either by rules framed under Sec. 241 of the Government of India Act, 1935 or on the advent of the Constitution under the proviso to Art. 309 of the Constitution. It must be conceded that in the absence or statutory rules, conditions of service in a particular cadre may be governed by executive instructions issued by the Government in exercise of its executive power At any rate, 1940 Order does not purport to lay a statutory rule framed under Sec 241 of the Government of India Act 1935 because the memorandum recites that in view of the provisions contained in Sec 241. rules have to be framed for appointment to civil service and posts and conditions of service of persons serving. It further recities that rules will have to be framed in respect of services which may be created for the first time after the advent of the Government of India Act, 1935. The memorandum further provides that whenever there is an occasion for framing statutory rules or issuing executive instructions governing conditions of

service, there must be some unformity in this behalf and accordingly the memorandum proceeded to point out what should generally be the contents of the rules and on what model they should be framed. Therefore, unquestionably the memorandum prescribes guibe lines for framing rules governing conditions of service. The memorandum is something akin to model standing orders. At any rate it does not purport to prescribe statutory rules or executive instructions governing conditions of service. This further becomes clear from the penultimate paragraph of the memorandum in which it is stated that the principles set out in the memorandum will be generally suitable for service or posts recruitment to which is conducted through the Public Service Commission and whenever the departure is made the same should be justified. Directions are given by the memorandum that the departments of the Secretariat should proceed with the revision of the existing service rules or frame rules for new service and posts under their control in accordance with the principles set out in the memorandum. The departments were directed to draw-up the draft rules and when ready they were required to be submitted for the scrutiny of the appointment department and should be accompanied by a self-contained note in which the important points and deviation from the above principles should be explained and justified. It is thus abundantly clear that the memorandum of 1940 merely prescribed guidelines for the departmemts of the Secretariat either to frame statutory rules or executive instructions governing conditions of service in respect of existing service, if there are no rules or they may be modified or amended so as to bring them generally in conformity with the 1940 Order and whenever a new post or a new cadre in a service is set up to frame rules in conformity with guidelines prescribed in 1940 order. The 1940 Order does not purport to lay down conditions of service governing any cadre either specifically or generally. It provided a model and unless the model is adopted, it is commonsense to say that it is not binding. Therefore, the contention that 1940 Order prescribes binding conditions of service and which have been followed in drawing-up the seniority list does not commend to us and must be rejected.

11. Assuming that in the absence of any specific rule to the contrary having not been shown to have been adopted, the Department accepted the model as the binding one, the next question is : whether upon its true construction it permits previous service to be wholly ignored in reckoning seniority.

12. The model set out at Item No. 11 governing seniority merely enacts the well-known rule of seniority in Govrnment Service namely, seniority being determined in accordance with length of continuous officiation. In the absence of any other rule valid for determining seniority under Art. 16 this rule of seniority being determined by

the length of continuous officiation has been accepted as valid by the courts. In a very recent opinion of this Court in P. S. Mahal v. Union of India (Rendered on May 23, 1984 in W. P. Nos 157 162 of 1976) : Bhagwati, J. after referring to Bishan Sarup Gupta v. Union of India (1975) 1 SCR 104 : observed as under :

"There was no specific seniority rule to determine inter se seniority between the direct recruits and the promotees appointed regularity within their respective quota from and after 16th January, 1959 and though in the absence of any specific seniority rule, the Court could have applied the residuary rule based on length of continuous officiation, the Court did not do so because it felt that since the old seniority rule had ceased to operate by reason of the infringement of the quota rule, it would be for the Government to devise "a just and fair seniority rule as between the direct recruits and the promotees for being given effect to from 16th January, 1959."

Therefore, in the absence of any specfic rule of seniority governing a cadre or a service, it is well-settled that length of continuous officiation will provide a more objective and fair rule of seniorty. And that is exactly what the model in the memorandum prescrides. It say that seniority in service shall generally be determined from the date of substantive appointment to a service. It the rule were to stop here, the quesiion would arise; what constitutes substentive appointment to a post within the purview of the Public Service Commissions? But the rule does not stop by merely saying that seniority shall generally be determined from the date of substantive appointment to a service. It further provides that it may be determined commencing from the date of the order of the first appointment, but proceeds to qualify the last clause by providing : 'if such appointment is followed by confirmation.' In other words, a rule for determining seniority may provide length of continuous officiation from substantive appointment or from the date of the order of the first appointment if such appointment is followed by confirmation. In the latter case, once confirmation is made and the service till then is uninterrupted and continuous it relates back to the date of the order of the first appointment. Now model Rule 11 suggests as guidelines two independent principles for determining seniority namely (1) seniority be reckoned from the date of substantive appointment and (2) from the date of the order of first appointment If such appointment is followed by confirmation. Two different starting points for reckoning seniority are set out in the model and it is difficult to assume that a department adopted one and rejected the other without making a specific rule in that behalf.

13. The question that can then be posed is : what constitutes substaative appointment in a cadre which is within the purview of the Public Service Commission. Now the cadre of Khandsary Inspectors was formed in 1959. There is no material to show that at that time

was within the purview of the Public ervice Commission. A vague statement was made that under the Uttar radesh Public Service Commission Limitation of Functions) Regulations, 954 any post with a sanctioned scale, e maximum of which exceeds Rs. 200/- ould be within the purview of the Pubc Service Commission. It was therere, said that the post of Khandsary spector was within the purview of the ublic Service Commission. It was en urged that as the 'Khandsary Licesing Scheme' was to be urgently impmented, the appoiting authority filled- the posts pending recruitment by the ublic Service Commirsion. This statement is not borne out by the record. n May 4, 1960. 9 persons including etitioners Nos. 1 and 2 were temporrily appointed as Licensing Inspectors. he appointment order does not show at the appointment was pending election of regular candidates by the ublic Service Commission. In fact, ome confusion in this behalf crept in ecause a statement was made at the earing of these petitions that the post f Khandsary Inspectors came within he purview of the Publice Servic Commission in 1961. Undoubtedly, the post f Licensing Inspector was created in he first instance up to March 31, 1960, ut it may be mentioned that has conitnued uninterruptedly till toay and has become a permanent cadre. dentical appointment order was issued n favour of petitioner No. 3 some of he petitioners including petitioners Nos. 4, 5, 6, 7 and 8 and some of the espondents including respondents Nos. 4, 5, 6, 7 and several others came to be uppointed by the Order dated March 23, 1961. (Annexure 'B' to the petition). In this appointment order it was clearly stated that 'on the result of the qualifying test and interview held for the posts of Khandsari Inspectors in the months of February and March, 1961, the candidats as noted in the enclosed list are temporarily appointed as officiating Khandsari Inspectors in the scale of Rs. 120-6-210-EB-10-250 plus usual dearness allowance per month subject to final selection by Public Service Commission at any later date' The recitals in the order do not spell-out that the appointees were to hold stop-gap arrangement till a candidate selected by the Public Service Commission is made available. On the contrary, the recitals clearly indicate that those appointees will have to face the approval test by the Public Service Commission Now if petitioner Nos. 1 and 2 came to be appointed in 1960 and respondents 4, 5 and 6 came to be appointed in 1961 and the appointment of each if them had to be approved by the Public Service Commission, once the approval is granted, the same will relate back to the date of first appointment. That is the meaning of the expression in Model No. 11; or from the date of the order of the first appointment, if such appointment is followed by confirmation.' It is not disputed that all the petitioners except petitioner 4 were approved by the Public Service Commission on September 30, 1963 and yet respondent No.7 – J.S. Negi is shown at S. No. 17 while petitioner No. 1 who joined service on

March 4, 1960 and whose appointment was approved on the same day has been assigned S. No. 27 in the seniority list. If the first appointment is made by not following the prescribed procedure but later on the appointee is approved making his appointment regular, it is obvious commonsense that in the absence of a contrary rule, the approval which means confirmation by the authority which had the authority power and jurisdiction to make appointment or recommend for appointment, will relate back to the date on which first appointment is made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. That has not been done in this case. Therefore, assuming that the model principle set out in the 1940. Order has a binding effect, the impugned seniority list does not conform to the prescribed guideline and would certainly be invalid.

14. Once it is shown that the 1940 Order did not prescribe any binding rule or seniority, but it was a model prescribed for adoption and the adoption having not been shown, it cannot prescribe a binding rule of seniority. Assuming that it is deemed to have been adopted the seniority list does not conform to the model as interpreted by us.

15. Now if there was no binding rule of seniority it is well-settled that length of continuous officiation prescribes a valid principle of seniority. The question is : from what date the service is to be reckoned? It was urged that any appointment of a stop gap nature or pending the selection by Public Service Commission cannot be taken into account for reckoning seniority. In other words, it was urged that to be in the cadre and to enjoy place in the seniority list, the service rendered in a substantive capacity can alone be taken into consideration. We find it difficult to accept this bald and wide submission. Each case will depend upon its facts and circumstances. If a stop-gap appointment is made and the appointee appears before the Public Service Commission when the latter proceeds to select the candidates and is selected, we see no justification for ignoring his past service. At any rate there is no justification for two persons selected in the same manner being differently treated. That becomes crystal clear from the place assigned in the seniority list to petitioner No. 1 in relation to respondent No. 7. In fact if once a person appointed in a stop-gap arrangement is confirmed in his post by proper selection, his past service has to be given credit and he has to be assigned seniority accordingly unless a rule to the contrary is made. That has not been done in the case of all the petitioners. The error is apparent in the case of petitioner 1 and respondent No. 7. These errors can be multiplied but we consider it unnecessary to do so. In fact a fair rule of seniority should ordinarily take into account the past service if the stop-gap arrangement is followed by confirmation. This view which we are taking

is borne out by the decision of this Court in Baleshwar Dass v. State of U. P., (1981) 1 SCR 449 : (AIR 1981 SC 41), wherein this Court observed that the principle which has received the sanction of this Court's pronouncement is that 'officiating service in a post for all practical purposes of seniority is as good as service on a regular basis. It may be permissible, within limits for Government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules in that regard are clear and categorical and do not admit of any ambiguity and cruelly arbitrary cut-off of long years of service does not take place or there is functionally and qualitatively substantial difference in the service rendered in the two types of posts'. It was said that service rules will have to be reasonable, fair and not grossly unjust if they are to survive the test of Articles 14 and 16. It is thus well-settled that where officiating appointment is followed by confirmation unless a contrary rule is shown, the service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation for determining the place in the seniority list. Admittedly, that has not been done and the seniority list is drawn up from the date on which the approval/selection was made by the Public Service Commission in respect of each member of the service, which is clearly violative of Art. 16. and any seniority list drawn up on this invalid basis must be quashed.

16. Agrievance was made that the petitioner have moved this Court after a long unexplained delay and the Court should not grant any relief to them. It was pointed out that the provisional seniority list was drawn up on March 22 1971 and the petitions have been filed in the year 1983. The respondents therefore submitted that the Court should throw out the petitions on the ground of delay, laches and acquiescence. It was said that promotions granted on the basis of impugned seniority list were not questioned by the petitioners and they have acquiesced into it. We are not disposed to accede to this request because respondents 1 to 3 have not finalised the seniority list for a period of more than 12 years and are operating the same for further promotion to the utter disadvantage of the petitioners. Petitioners went on making representations after representations which did not yield any response, reply or relief. Coupled with this is the fact that the petitioners belong to the lower echelons of service and it is not difficult to visualise that they may find it extremely difficutl to rush to the Court. Therefore, the contention must be rejected.

17. In view of the discussion, these petitions succeed and are allowed and a writ in the nature of certiorari is issued quashing the impugned seniority list dated March 22, 1971 in respect of Khandsari Inspectors. The respondents 1 to 3 are directed to draw-up a fresh seniority list based on the principle of length of continuous officiation rec-

Report No. 102, p. 12

D. A. Desai
Judge
Supreme Court of India

oned from the date of first appointment if the appointment is followed by confirmation i.e selection/approval by the State Public Service Commission. We order accordingly, but in the circumstances of the case, there will be no order as to costs.

Petitions allowed.

Y. V. Chandrachud
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Arts. 226, 311—Writ Petition—Laches—Works Manager of Haryana Roadways compulsorily retired—Review application field by him, rejected Manager thereupon filing writ petition challenging his compulsory retirment as well rejection of his review application—Dismissal of writ petition on ground that remedy of review adopted by Manager was tenuous remedy, is improper. W. P. N. 3944 of 1979, D 20-12-1979 (Punj & Har), Reversed. (Paras 2,3)

OBSERVED BY

Y. V. Chandrachud,
D. P. Madon and
Ranganath Misra,

Hon'ble Chief Justice and Judges, Supreme Court of India

IN

Civil Appeal No. 3417 of 1982, decided on 19-7-1984, between Sikander Pal Jain Appellant v. State of Haryana and others, Respondents

TEXT

Chandrachud, C. J. :— The appellant who was working as a Works Manager, Karnal Depot, Haryana Roadways was retired compulsorily by an order dated May 14, 1976. He filed a review petition to the Government of Haryana to challenge the order of compulsory retirement. That review petition was disposed of by the State Government on July 9, 1979. The appellant filed a writ petition in the High Court of Punjab and Haryana on October 23, 1979 to challenge the order of compulsory retirement and the refusal of the State Government to review that order. The writ petition was dismissed by the High Court on the ground mainly that though the order of compulsory retirement was passed in May, 1976 the appellant merely resorted to a tenuous claim for reviewing that order instead of challenging that order on merits in a Court of law. Being aggrieved by the order of the High Court the appellant has filed this appeal by special leave.

2. We are unable to accept the view of the High Court that in seeking a review of the order by which he was retired compulsorily the appellant adopted a tenuous remedy. It is clear from the very order dated July 9, 1979 passed by the Secretary, Haryana Government Transport Department that a Review Board is constituted by the State of Haryana for reviewing orders of compulsory retirement. That order says that the case of the appellant was put up before the "Review Board" but the Board did not feel the necessity of changing the decisions which was already

taken by the Government. In these circumstances it cannot be said that the appellant had resorted to a tunuous remedy for the vindication of his rights.

3. As stated above the review order is dated July 9, 1979 while the writ petition was filed by the appellant in October 1979. Obviously the writ petition could not have been dismissed on the ground that is suffered from laches.

4. The High court has made a passing observation that there was no infirmity in the order of compulsory retirement but no reason at all has been given in support of that observation, It seems to us that being influenced by the consideration that the writ petition suffered from laches the High Court did not consider the merits of the matter. Since we are differing from the High Court on the question of laches and find that the writ petition did not suffer from any defect of a preliminary nature it becomes necessary to remand the matter to the High Court for re-consideration of the writ petition on merits.

5. Miss Lily Thomas who appears on behalf of the appellant has raised two principal contentions before u
The first contention is that the order c
compulsory retirement is bad because i
was passed without consulting State Pu
blic Service Commission. The secon
contention is that the appellant coul
not have been retired compulsorily be
fore he had completed 25 years of ser
vice. The High Court will examine th
correctness of these and any other con
tentions which the appetlant may legiti
matly raise raise before it.

6. It would appear that the appell
ant would have retired in the normal
course in 1982. On that basis he woul
be entitled to retirement benefits under
the relevant rules. Even on the basis
of compulsory retirement he would we
suppose to be entitled to retirement benefits due to the appellant have not been given to him the High Court will pass an appropriate order directing the Government to give the same to him.

7. The appeal is accordingly allowed with costs which we quantify at one thousand rupees.

Appeal allowed.

R. B. Misra
Judge
Supreme Court of India

OBSERVATION

Constitution of India, Arts. 226 and 320—Provisions of Art 320 are directory—Person selected by Public Service Commission—Has to right to appointed—No mandamus lies.

OBSERVED BY

D.A. Desai,
Amrendra Nath Sen
and R.B. Misra,

Hon'ble Judges Supreme Court of India.

IN

Civil Appeal No. 1194 of 1984, decided on 28-9-1984, between Jatinder Kumar and others, Appellants v. Stat of Punjab and others, Respondents.

TEXT

R.B. Misra, J. :—The main question for consideration in this appeal by special leave is whether a person selected by the subordinate Service Selection Board for direct appointment to the post of Assistant Sub-Inspector of Police has got an unfettered right to be appointed on the basis of the recommendation made by the said Board.

2. The material facts to bring out the point in controversy are as follows. On 31 st of March, 1978 the Inspector General of Police, Punjab, respondent No 2, sent a requisition to the Subordinate Service Selection Board (for short, the Board), respondent No 3 to select and recommend 7 suitable persons for the post of Assistant Sub-Inspector of Police. while the matter was pending consideration 50 more posts of Assistant Sub-Inspectors of Police became available and, therefore, the Board was recommend 57 suitable persons for these posts. The appellants along with many others were interviewed and physically tested on various dated ranging from 24 th of October, 1978 to 6th of February, 1979. Later on after the interviews were over but before the select list could be finalised by the Board the Inspector General of Police vide his letter dated 31st of August, 1979 requested the Board to recommend 170 more persons in addition to 57 already under consideration in anticipation of further vacancies likely to occur as a result of expected reorganisation of the Police Force. In that connection a proposal for the disbandment of the Punjab Armed Police Battalion and instead creation of some

additional posts for the District Police, had already been submitted. Thus, in all 227 candidates were to be recruited by the Board for the post of Assistant Sub-Inspectors of Police The Board, however, recommended a panel of 144 candidates on 22nd of December, 1979.

3. It appears that the proposal for disbandment of the Punjab Armed Police Battalion and creation of additional posts in the districts referred to above was turned down by the Government and, therefore, the anticipated 170 temporary vacancies of Assistant Sub-Inspectors against direct recruitment quota could not be available. Out of the earlier 57 posts, however, 9 were offered to the wards of the deceased police officers in accordance with the Punjab Government instructions regarding priority appointments issued vide letter No. 80 (GOI) -SII (3)/73/ 12092 dated 18th April, 1973 The remaining 48 posts were offered to the candidates recommended by the Board in order of meirt determined by the Board Since the remaining candidates recommended by the Board pursuant to the latter requisition were not appointed as there were no vacancies, the disgruntled candidates filed two petitions under Art. 226 of the Constitution before the High Court.

4. The stand of the petitioners in the two petitions was :

(a) that the vacancies had already been communicated to the Board and it was on that basis that the board had recommended their names for appointment and the State was bound to appoint them on the basis of the recommendation of the Board;

(b) that ths State was bound to follow the Punjab Police Rules and under rule 12.3 twenty-five per cent of the posts in the rank of Assistant Sub-Inspectors are to be filled in by direct recruitment and the remaining seventy-five per cent are to be filled by promotion;

(c) that the State adopted a device of making ad hoc appointment of the Assistant Sub-Inspectors by posting Head-Constables as Assistant Sub-Inspectors and the whole action was malafide as the State Government intended to select and appoint its own favourites;

(d) that the action of the Government in not appointing them pursuant to the recommendation of the Board is violative of Arts. 14 and 16 of the Constitution;

(e) that even after the abolition of the Board the candidates recommended by it could not be refused appointment on the ground that the Board later on became functus officio;
and

(f) that even after the expiry of six months fixed by the Government instructions the petitioner could be appointed on the basis of recommendation of the Board.

5. The petitions were resisted by the State Government on the ground inter alia that by 7th of January, 1980 only 57 posts in the direct recruitment quota became available and appoint-

ments were made. As regards the remaining vacancies of 170 temporary posts of Assistant Sub-Inspectors, proposal for disbandment of the Punjab Armed Police Battalion and instead creation of some additional posts for the District Police was eventually turned down by the State Governmnt and so no additional vacancies became available and the petitioners could not be appointed. In any case the petitioners could not claim appointment as of right merely because the Board had recommended their names. It was further pleaded that according to the Government instructions issued vide letter No. 1673-C-II-56 dated 22nd March, 1947 a time limit of six months had been prescribed for filling up the vacancies by persons recommended by the Board and after the expiry of six months a fresh reference had to be made to the Board. As six months prescribed had already expired the petititioners could not be appointed on the basis of the recommendation of the Board. They also denied the allegation of malafides in the ad hoc appointment of other persons and further pleaded that the refusal of the Government to appoint them was not hit by Articles 14 and 16 of the Constitution.

6. On a consideration of the material on the record the record the learned single Judge came to the conclusion that there was neither any vacancy in the quota of direct recruits of Assistant Sub-Inspectors nor a single post meant for direct recruits is manned by an ad hoc employee, that no case of mala fides of favouritism has been made out, and that there was no violation of Articles 14 and 16 of the Constitution. A letters patent appeal preferred by the petitioner before the High Court.

7. The petitioners before this Court in appeal categorically stated on oath that 500 promotions had been made by the State of Punjab and that the petitioners were entitled to 25 per cent of those posts according to quota rule. They also alleged that 250 vacancies of Assistant Sub-Inspectors were available in the C. I. D. wing alone in the Punjab Police and 250 persons had not promoted against those vacancies on ad hoc basis. This Court by its order dated 9th January, 1984 directed the State to supply detailed information to the petitioners of the names and designations of the Head Constable promoted as Assistant Sub-Inspectors between the period from 1979 to 1983. Pursuant to that order the State gave full details or the various promotions made in various ranges totalled 646 and according to the State during 1979-1983, 576 vacancies of Assistant Sub-Inspectors in promotee quota became available on account of promotion of 576 Assistant Sub-Inspectors to the rank of Offg. Sub-Inspectors, 5 against retirement of such officers, 13 due to death, 2 due to dismissal and 4 due to reversion of promotee Assistant Sub-Inspectors. In addition, a total of 60 additional temporary posts of Assistant Sub-Inspectors were sanctioned by the Government during the period against which such promotions were mude. Thus out of the total 660 vacancies of promotee

quota during the aforesaid period 646 promotions had been made and on 31st December 1983 there were 14 vacancies in the rank of Assistant Sub-Inspectors against promotee quota.

8. Before we deal with the points raised by Mr. Frank Anthony in support of the appellants we must record our disapproval of the inconsistent pleas taken by it at various stages. To start with, it took up the plea that there were no ad hoc appointments of Assistant Sub-Inspectors from 1979 but later on it went back upon its previous statement and admitted that there were ad hoc appointments made but explained the position by subsequent affidavits wherein it was stated that the C.I D. has no cadre strength of its own and all the posts, excetd language stenographers, are filled in by taking officers on deputation from other units of the Police department and no ad hoc appointments were made in the rank of Assistant Sub-Inspectors and that the petitioners could not be appointed as no posts for the petitioners were available with the department, but it is not necessary to refer to those explanations in any detail.

9. Be that as it may, the fact remains that in anticipation of the proposal for disbandment of the Punjab Armed Police Battalion and instead creation of some additional posts for the district Police a requisition was made for selecting 170 more candidates for direct appointment to the post of Assistant Sub-Inspectors. But the proposal having been turned down by the Government there were no vacancies and, therefore, the question arises whether the petitioners have got an unfettered right to be appointed even though the aforesaid proposal had not been accepted and consequently there were no vacancies.

10. We now take up the contentions raised by Mr. Frank Anthony, counsel for the appellants, that they have a right to be appointed to the post of Assistant Sub-Inspectors on the basis of the selection made by the Board.

11. Article 320 of the Constitution enumerates the duties to be performed by the Union or the State Public Service Commission :

(i) to conduct examinations for appointment to the services of the Union and the services of the State respectively;

(ii) if requested by any two or more States so to do, to assist those States in framing and operating schemes ofjoint recruitment for any services for which candidates possessing special qualifications are required;

(iii) to advise on matters enumerated under cl. (3) of Article 320; and

(iv) to advise on any matters so referred to them and any other matter which the President, or as the case may be, the Governor of the State may refer to them.

The fact that there is no provision in the Constitution which makes the acceptance of the advice tendered by the

Commission, when consulted, obligatory renders the provisions of Art. 320 (3) only directory and not mandatory.

12 The establishment of an independent body like Public Service Commission is to ensure selection of best available persons for appointment in a post to avoid arbitrariness and nepotism in the matter of appointment It is constituted by persons of high ability, varied experience and of undisputed integrity and further assisted by experts on the subject It is true that they are appointed by Government but once they are appointed their independence is secured by various provisions of the Constitution Whenever the Government is required to make an appointment to a high public office it is required to consult the Public Service Commission. The selection has to be made by the Commission and the Government has to fill up the posts by appointing those selected and recommended by the Commission adhering to the order of merit in the list of candidates sent by the Public Service Commission. The selection by the Commission, however, is only a recommendation of the Commission and the final authority for appointment is the Government. The Government may acceept the recommendation or may decline to accept the same. But if it chooses not to accept the recommendation of the Commission the Constitution enjoins the Government to place on the table of the Legislative Assembly its reasons and report for doing so. Thus the Government is made answerable to the House for any departure vide Article 323 of the Constitution This, however, does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendation of the Commission If, however, the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz bad conduct or character. The Government also cannot appoint a person whose name does not appear in the list. But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus We are supported in our view by the two earlier decisions of this Court in A.N D, Silva v. Union of India 1962 Supp (1)SCR 968 and State of Haryana v. Subash Chander Marwaha (1974) 1 1 SCR 165 SC 2116). The contention of Mr. Anthony to the contaray cannot be accepted.

13. It was next contended for the appellants that the Punjab and Haryana High Court itself had taken a different view in G. S. Kalkat v. State of Punjab pronounced on 15th July, 1980. from the one taken in the instant case and a copy of the judgment in that case has been filed. We have perused the judg-

ment but find that the facts of that case were materially different from the facts of the case in hand.

14 The next contention raised on behalf of the appellants was that the action of the Government in not appointing them in spite of the fact that they were selected and their names were recommended by the Board for appointment, was mala fide. The allegations about mala fides are more easily made than made out. There are no materials before us to warrant the conclusion that the action of the State Government in not appointing them was mala fide especially when the posts in anticipation whereof the Board was asked to select more candidates came to and end. There was no question of their appointment against those vacancies.

15. Likewise, the contention that the action of the Government is hit by Arts. 14 and 16 of the Constitution has no substance. The case of the appellants is not identical with those of persons who were appointed as against 57 vacancies for which original requistion was made to the Board for selecting them,

16. An argument of desperation was further advanced about promissory estoppel stopping the State Government from acting in the manner it did not appointing the appellants although their names had been recommended. The notification issued by the Board in this case was only an invitation to candidates possessing specified qualifications to apply for selection for recruitment for selection for recruitment for certain posts. It did not hole out any promise that the selection would be made or if it was made the selected candidates would be appointed The candidates did not acquire any right merely by applying for selection or for appointment after selection. When the proposal for disbandment of the Punjab Armed Police Battalion and instead creation of additional posts for the district police was turned down by the State Government, the appellants were duly informed of the situation and there was no question of any promissory estoppel against the State.

17. It was further contended by Mr. Anthony that the recommendation made by the Board would remain effective even after the body had become defunct. It is not necessary to go into detail on this contention inasmuch as the fate of the case depends upon whether the appellants had a right to get appointed on the basis of the selection and recommendation made by the Board. The appellants came to Court to vindicate their right but if they had no right there was no question of enforcing that right.

18. For the foregoing discussion the appeal has no force and, therefore, it must fail. It is accordingly dismissed but in the circumstances of the case the parties should bear their own costs.

Appeal dismissed.

A.P. Sen,
Judge
Supreme Court of India

OBSERVATION

Constitution of India—Article 311(2)—Punjab Police Rules, 1934—Valume 7 rule 21 – Discharge from service in innocuous from on the basis of misconduct after king enquiry behind the back of appellant without serving charge sheet, calling ex- nation and giving opportunity to cross examine witnesses—Order is liable to be shed and set aside **(Para 8)**

OBSERVED BY

A. P. Sen and
B. C. Ray,
Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 2327 of 1986, decided on 8th August, 1986, between Smt. inder Kaur, Appellant, versus Punjab State and another, Respondents,

TEXT

A. P. Sen, J. :-- After hearing the rned counsel for both the parties and consideration of the question of law olved in this petition, Special Leave ranted. Arguments heard.

2. The appellant petitioner was pointed as a lady constable in Hoshi- ur District on 7.5.1979. After com- tion of training she was posted in rch, 1980 in the police lines, Hoshi- ur. The Superintendent of Police shiarpur discharged the appellant m service by an order dated 9-9-1980 der Rule 12.21, volume 7 of the Pun- Police Rules, 1934 The said order n the following terms :

"Lady Constable Rajinder Kaur . 752 if unlikely to prove an efficient ice officer. She is, therefore, hereby charged from the Police Force under P. P. 12.21 with effect from today (9-9-1980).

Issue orders in O.R. and all concerned to notice and necessary action".

This order was made, it has been stated in the petition, without serving any charge sheet on her and without asking her to explain any charge. The order also has not recorded any reason for her discharge from service. Against this order the appellant made a representation to the Deputy Inspector General of Police, Jullunder Range. The said representation was rejected on 17-10-80. The appellant filed a revision against the order of the Deputy Inspector Genral of Police and the same was also dismissed on 15-4-81. The appellant thereafter filed a civil suit No. 327/ASSJ/82 in the Court of Additional Senior Sub-

Judge, Hoshiarpur on 16.11.1981 challenging the order of discharge as bad, arbitrary and against the principles of law. The said suit was dismissed by the Additional Senior Sub-Judge, Hoshiarpur on 28.2.1983. Thereafter the appellant filed an appeal before the District Judge, Hoshiarpur on 31.3.1983 and it was numbered as Civil Appeal No. 45 of 1983. The said appeal was dismissed on 7-5-1984 and the judgment of the Trial Court was confirmed. A Regular Second Appeal No. 2189 of 1984 was filed before the High Court of Punjab Haryana at Chadigarh. The said Second Appeal was dismissed on 10-10-1984. Hence the instant application for grant of special leave to appeal under Article 136 of the Constitution has been filed in this Honourable Court be the appellant.

3 The main argument advanced on behalf of the appellant is that the impugned order of discharge from service was made not in accordance with Rule 12.21 of the Punjab Police Rules, 1934 in accordance with the terms and conditions of the service but it was made by way of punishment. An enquiry was made by the Deputy Police Superintendent, Garhshankar as to the character of the appellant into the allegation that she stayed at Mahalpur for 1 or 2 nights with one constable, Jaswant Singh and evidences were recorded therein without giving the appellant any opportunity of hearing in the enquiy and without giving the appellant any opportunity to cross-examine the witnesses and the impugned order was

made after the completion of the inves
gation on the ground of her miscondu
which casted a stigma on her servi
career. The order in question is, ther
fore, not an innocuos one thou
expressed in innocuous terms. It
made by way of punishment, the grou
being her misconduct as found on t
basis of the investigation of certa
allegations behind her back.

4. It was urged on behalf of t
respondents that the order dischargi
the appellant from service was not mac
by way of punishment. The order w
made in accordance with the terms
Rule 12.21 of the said Rules whic
empowers the athorities to do awa
with the service of the constable at an
time within three years of her enro
ment, if she is found unlikely to prov
an effcient police officer, by the Superin
tendent of Police and no appeal ha
been provided for under the Rule
against the said order of discharge.
was, therefore, urged that the orde
being made in accordance with th
conditions of service of the appellan
and so it is unchallengeable before thi
Court by filing a special leave petitio
to appeal.

5. Admittedly, the appellant wa
appointed as a lady constable o
7-5-1979 and she was posted in marc
1980 in the Police lines, Hoshiarpu
after completion of her training. It ha
been stated in para 15 of the petitio
that on an allegation made by the depa
rtment against the appellant that sh
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investigation was caused to be mad

into the said allegation against her conduct and on the basis of that investigation the impugned order of discharge was made by the Superintendent of Police, Hoshiarpur. In Para 15 of the counter affidavit sworn on behalf of respondent it has been stated that the superintendent of Police, Hoshiarpur got conducted a confidential enquiry through a Deputy Superintendent of Police regarding the conduct of the appellant. On an overall assessment of the work and conduct of the appellant the Superintendent of Police, Hoshiarpur came to the conclusion that she was not likely to become an efficient Police Officer and thus passed an order discharging her from service in accordance with the conditions of the service. These averments made in para 15 of the counter-affidavit have been verified to be true and correct to the knowledge of the deponent based upon the information deprived from the record of the case. Thus, it is clear from these averments that the impugned order of discharge though stated to be made in accordance with the provisions of Rule 12.21 of the Punjab Police Rules, 1934, is really made on the basis of the misconduct as found on enquiry into the allegation behind her back by the Deputy Superintendent of Police, Garh-Shankar. It is not disputed that the enquiry was made without serving her the charge-sheet and without giving her any opportunity to explain the charges and the allegations levelled against her. The enquiry was conducted behind her back and on the basis of the result of the investigation she was discharged from service. Therefore in these circumstances, it does not lie in the month of the respondents to submit before this Court that the order is an innocuous and it is an order made simply in accordance with the conditions of her service under Rule 12.21 of the said Rules. On the other hand, in the background of these facts and circumstances it is crystal clear that the impugned order of discharge from service of the appellant was made on the ground of her misconduct and it is penal in nature as it casts a stigma on the service career of the appellant.

6. The next question arises is whether the appellant who is yet to be confirmed in the service and has no right to the post in question, the impugned order can be assailed as violative of the protection given by Article 311 (2) of the Constitution. This point has been well-settled by several decisions of this Court.

7 This Court has stated in no uncertain terms in the case of P.L. Dhingra v. Union of India 1958 SCR p. 828 at 862, as follows :

"But even if the Govt. has, by contract or under the rules the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank the Government may nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then if it is a punishment and the requirements of Article 311 must be complied with.

This decision has been relied upon by this Court in the case of K.H. Phadnis v. State of Maharashtra 1971 SCR (Supp.) p. 118, where it has been held that even in the case of reversion of an employee who has been repatriated from the temporary post of Controller of Food, Grains Department to his parent department of Excise and Prohibition, to which had a lien might be sent back to the substantive post in ordinary routine administration or because of exigencies of service. Such a person may have been drawing a salary more than that of his substantive post but when he is reverted to the parent department the loss of salary cannot be said to have any penal consequences. The matter has to be viewed as one of substance and all relevant factors have to be considered in ascertaining whether the order is a genuine one of accidence of service in which a person sent from the substantive post to a temporary post has to go back to the parent post without any aspersion against his character or integrity, or whether the order amounts to a reduction in rank by way of punishment.

8. It has been further observed by this Court in the case of State of Bihar & Ors. v. Shiva Bhikshuk Misra. 1971 (2) SCR 191 at 196.

"The form of the order is not conclusive of its true nature and it might merely be a cloak and camouflage for an order founded an misconduct. It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order."

In the case of Shamsher Singh and anr. v. State of Punjab, 1975 (1) SCR p. 874 at 837, it has been observed as under :

"No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination then that the services are terminated it can never amounts to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311 (2) of the Constitution."

It has been observed this Court in the case of Anoop Jaiswal v. Government of India & Anr. 1984 (2) SCR 453 as under.

"When the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the true character of the form and ascertain order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee".

On a conspectus of all these decisions mentioned hereinbefore, the irrestible conclusion follows that the impugned order of disharge though couched in innocuous, terms, is merely a camouflage for an order of dismissal from service on the ground of misconduct. This order has been made without serving the appellant any charge-sheet, without asking for any explanation from her and without giving any opportunity to show cause against the purported order of dismissal from service and without giving any opportunity to cross-examine the witnesses examined, that is in other words the order has been made in total contravention of the provisions of Article 311 (2) of the Constitution. The impugned order is, therefore, liable to be quashed and set aside. A writ of certiorari be issued on the respondents to quash and set aside the impugned order dated 9-9-1980 of her dismissal from service. A writ in the nature of mandamus and appropriate directions be issued to allow the appellant to be reinstated in the post from which she have been discharged. The appeal is thus allowed with costs. The authorities concerned will pay all her emoluments to which she is entitled to in accordance with the extant rules as early as possible in any case not later than eight weeks from the date of this judgment.

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IT IS THEESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

Report No. 106, p. 01

Murari Mohan Dutt
Judge
Supreme Court of India

OBSERVATION

General Rules—Rule 33 (a)—Interse seniority between personnels appointed by ay of stop gap arrangement and appointed through public service commission—Stop ap appointed, although were eligible to appear in the qualifying test but failed o avail that opportunity and were regularised subsequently by Government as er the policy decision—Whether they may be treated as senior to those who were appointed through Publice Service Commission prior to their regularisation -(No)

OBSERVED BY

O. Chinnppa Reddy
and Murari Mohan Dutt,

Hon'ble Judges, Supreme Court of India.

IN

W. P. No. 106 of 1980, and Civil Appeal No. 2735 of 1986 decided on 8th August, 1986, between Smt. M. Nirmala and others, petitioners v. State of Andhra Pradesh and others, Respondents.

TEXT

Dutt, J. The Writ Petition No 106 of 1980 under Article 32 of the Constitution of India preferred by the petitioners, Smt. M. Nirmala & 309 others, and the appeal by special leave filed by the State of Andhra Pradesh have been heard together as they involve the common question as to the seniority of certain employees of the Government of Andhra Pradesh in Group II and Group IV services Group II services relate to the posts of Junior Assistants in the Secretariat and Group IV services relate to the posts of Lower Division Clerks, Lower Division Assistants, Lower Divison Typists and Steno Typists.

2. The petitioners are working in Group IV services in various Departments of the Government of Andhra Pradesh. On August 18, 1970 by G. O. Ms. No. 682, the Government of Andhra Pradesh put a ban on direct recruitment of all categories of State and subordinate services, pending the recommendations of the Backward Classes Commission. In spite of the said order baning direct recruitments, the Government had to appoint employees in all Departments in view of exigencies of circumstances and in the public interest. Such appointments were made under the General Rule 10 (a) (i) (1) on a purely temporary basis. Most of the petitioners were appointed after April, 1974 as temporary employees under General Rule 10 (a) (i) (1). Indeed General Rule

10 (a) (iii) provides that a person appointed under clause (i) shall, whether or not he possesses the qualifications prescribed for the service, class or category to which he is appointed, be replaced as soon as possible by a member of the service or an approved candidate qualified to hold the post under the rules. In view of clause (iii) of General Rule 10 (a), the appointments on the petitioners were to be replaced as soon as possible by qualified and approved candidates.

3. In 1973, the ban on recruitment through Public Service Commission was partially lifted. By G. O Ms. No. 725 dated December 28, 1973, the Government of Andhra Pradesh directed the Public Service Commission to conducting a special qualifying test for recruitment in Group IV services with a view to regularising the temporary appointments made during the ban period. One of the conditions of eligibility for appearing at the said qualifying test was, as fixed by the public Service Commission, two years of service as on 1-1-1973. As the petitioners were appointed after April, 1974, the question of appearing at the said qualifying test did not arise. It appears that those who appeared at the said test were all absorbed in the regular service. On the representation of the temporary employees who were not absorbed, the Public Service Commission conducted another special qualifying test as directed by the Government by G.O. Ms. No. 787 dated November 9, 1976. The petitioners could not avail themselves of the said test as they had not put in two years of service as on 1-1-1976 as fixed by the Public Service Commission.

4 The temporary employees including the petitioners who were appointed on or after January 2, 1974, became eligible only in 1976 which year a test for recruitment through Public Service Commission was conducted to facilitate all temporary employees including the petitioners to compete for regular appointments. About 82,000 candidates appeared in the test for Group IV services. The petitioners, however, did not appear at the said qualifying test even though they were aligible for the same. At the same time, the petitioners and others, who did not appear at the qualifying test in 1976, began to put pressure on the Government for their absorption. The Government was also prevented from replacing the temporary employees including the petitioners by the candidates who were successful in the said qualifying test. The successful candidates were appointed to additional posts in Group II and Group IV services sometime in 1977 or 1978. The temporary employees made a representation to the Government that their appointments should be regularised without requiring them to appear at the special qualifying test. The Government seems to have yielded to the pressure brought to bear upon it by these temporary employees, as a result of which the appointments of successful candidates in the said test could not be regularised. By Memo No. 1806/Ser B/78-2 dated

25.1.1979 the Government proposed to fix the inter se seniority between the Public Service Commission candidates, that is, those who passed in the qualifying test held in 1976 and the temporary employees who did not appear at the qualifying test. Being aggrieved by the said Memo. Certain Public Service Commission candidates belonging to Group II Services filed a representation being R. P. No. 145/79 before the Andhra Pradesh Andministrative Tribunal. Subsequently, another representation petition being R. P. No. 447 of 1979 was filed by certain other Public Service Commission candidates belonging to Group IV services including the respondents Nos. 18 to 108 in the writ petition.

5. While the said representation petitions were pending before the Andhra Pradesh Administrative Tribunal, the Govt. of Andhra Pradesh issued G.O. Ms. No. 646 dated September 14, 1979 whereby the temporary employees including the petitioners were exempted from appearing at any examination and the posts held by them were withdrawn from the purview of the Public Service Commission. By another order, being G O Ms. No. 647 dated September 14, 1979, Government directed regularisation of the temporary employees including the petitioners without subjecting them to any test, written or oral. One of the conditions of such regularisation, as contained in clause (b) of the G.O Ms. 647, is that "in the case of temporary Junior Assistants, Typists and Steno-Typists in the Secretariat and LDCs. Typists and Steno-Typists in the Offices of the Head of Departments, their services should be regularised from the date subsequent to the date of last regular appointment in that category or from the date of temporary appointment whichever is later and subject to the decision of the Andhra Pradesh Administrative Tribunal before which representation petitionsion this regard are pending." At this stage, it may be stated that R.P. No 145 of 1979 and R.P. No. 447 1979 were both decided by the Tribunal in favour of the Public Service Commission candidates, holding that their appointments were regular and their seniority should be computed from the respective dates of regular appointments under the General Rule 33 (a) which inter alia, provides that the seniority of a person in a service, class, category or grade. The State of Andhra Pradesh being aggrieved by the said order of the Tribunal passed in R.P. No. 145 of 1979, has preferred the instant appeal by special leave.

6 It is not in dispute that the Public Service Commission candidates including the respondents Nos. 18 to 108, who belong to Group IV services, were appointed sometime in 1977 or 1978 pursuant to their being successful in the special qualifiying test held by the Public Service Commission in 1976. In view of General Rule 33 (a), the seniority of the respondents should be computed from the respective dates of their appointments as held by Administrative Tribunal. The petitio-

ners, however, claim that their seniority should be computed from the respective dates of their appointments after April, 1974 so that they may be placed before the respondents Nos. 18 to 108 in the seniority list.

7. In our view, the claim of the petitioners is untenable. The petitioners were not appointed on a regular basis. but by way of stop gap arrangements to be replaced by the appointments of qualified candidates. The petitioners failed to avail themselves of the opportunity of qualifying themselves for regular appointments by appearing at the special qualifying test held in 1976, although they eligible for the test. The Government order being G.O. Ms. No. 647 dated september 14, 1979 on which much reliance has been placed by Mr. putti, learned counsel appearing on behalf of the petitioners, does not support their claim of seniority from the respective dates of their appointments after April, 1974 Under the said G.O.Ms. No. 647, the services of the employees belonging to Group IV services would be regularised from the date of last regular appointment in that category or from the date of emporary appointment, whichever is later and subject to the decision of the Andhra Pradesh Administrative Tribunal. The Andhra Pradesh Administrative Tribunal as stated already, held that the appointments of the Public Service Commission candidates were regular appointments. The appointments of the Public Service Commission candidates are, therefore, the last regular appointments as contemplated by G.O. Ms. No. 647. In view of the said decision of the Andhra Pradesh Administrative Tribunal and the directions contained in G.O. Ms. 647, the services of the petitioners will be regularised subsequent to the respective dates of appointments of the respondents No. 18 to 108 or the other emoloyees in Group IV servies, who were appointed pursuant to their being successful in the special qualifying test held by the Public Service Commission in 1976. The petitioners have not challenged the said G.O.Ms. No. 647, on the contrary, as stated already the have placed reliance upon the same and have also prayed for the implementation of the same. The petitioners, therefore, cannot assail the findings of the Andhra Pradesh Administrative Tribunal and claim that their seniority should be computed from the respective dates of their appointments after April, 1974.

8. We have also considered the findings of the Administrative Tribunal and we are of the view that the findings arrived at by it are quite legal and justified, and no exception can be taken to the same.

9. For the reasons aforesaid both the writ petition and the appeal are dismissed. However, in view of the peculiar facts and circumstances of the case, there will be no order as to costs.

petition dismissed.

R. N. Misra
Judge
Supreme Court of India

OBSERVATION

Central Civil Services (Commutation of Pension) Rules, 1981—Commutation of ension—Substantial improvement in the life expectancy—Government's offer to estore commuted portion of pension after 15 years of retirement or at the age of 70 ears of pensioner whichever is later in the case of Civilians pensioners and personnel f Armed Forces w. e. f 1-4-1986—Direction of Supreme Court, regarding the :

OBSERVED BY

P. N. Bhagwati and
R N. Misra

Hon'ble Judges Supreme Court of India.

IN

Writ Petition Nos. 3958-61 of 1983 decided on 9-12-1986, between "Common ause" A registered Society and others, petitioners v. Union of India, Respondent.

TEXT

R. N. Misra, J.—By these appl- ations under Article 32 of the Const- ution Common Cause, a registered ociety and three retired Government rvants have asked for striking down rtain provisions of the Commutation Pension Rules applicable to civilian nd defence pensioners as they permit e Union of India to recover more an what is paid to the pensioners oon commutation and for a direction at an appropriate scheme rationalis- g the provisions relating to commut- ion be brought into force. The resp- ndent has filed a counter-affidavits allenging the maintainability of the tition as also the claim of the petiti- ners and the matter has been heard at onsiderable length from time to time. arties have filed written submissions pplementing their oral arguments.

2. The Central Civil Service (Commutation of Pension) Rules, 1981 are the appropriate rule in force so far as civilian employees under the Government of India are concerned. A set of regulations in force in regard to Defence personnel.

3. It is not disputed that in the case of civilians the total amount of pension which can be commuted is upto one-third while in the case of Defence personnel, commutation is admissible upto 43 per cent in the case of officers and upto 45 per cent in respect of other ranks. The argument advanced on behalf of the petitioners that there has been a substantial improvement in the life expectancy of the people in India has not been refuted on behalf of the respondent. This Court suggested to the raspondent in course of the hearing

that in the changed situation now prevailing in the country, a new look should the be given to the matter. In deference to the suggestion made by this Court, respondent took time to consider the various aspects raised in the writ petitions and the oral submissions advanced at the hearing as also the written notes submitted in Court. It also took into account the fact that several State Governments have changed the rule applicable to commutation and have restored full pension to the pensioners who commuted a part of their pension after lapse of fifteen years. Union of India has now agreed to restore the commuted portion of the pension in regard to all civilian employees at the age of seventy years or after fifteen years, whichever is later, and has agreed to take this effective from April 1, 1986. This decision of the Respondent was communicated to the learned Attorney Genearl by a letter dated 20. 3. 1986 reading thus :

> "I am glad to inform you that Government have taken a decision in the matter of recovery from pension towards commuted value of pension. The decision is as follows :
>
> (i) Recovery from pension payable every month towards comuted value of pension will stop on the completion of 15 years from the date of retirement on superannuation or on the pensioner completing the age of 70 years, whichever is later.
>
> (ii) The formulation will apply to all civilian pensioners in whose case the age of retirement on superannuation is 58 years and the personnel of Arme Forces in whose case the retirement ag varies in accordance with the colou service prescribed for the rank (attain ing the age of 37/38 years or more)
>
> (iii) Government have taken thi decision as an act of goodwill to pensi oners and to extend to them some mea sure of relief in the evening of thei leves. It is sincerely believed that ther will be no further demand on this issu and that the pensioners will accept th decision of the Government withou dissent or reservation
>
> (iv) The decision will take effec prospectively (from April 1, 1986) "

A distinction has been made in th cases of Defence employees on th ground that retirement in their case is a an early age and merely with lapse of a period of fifteen years full pension could not be restored It has also been pointed out that the Defence personnel receive in consideration of the exigencie of the service a higher rate of pension as compared to civilian employees.

4 As the position now stands, when a pensioner commutes any part o his pension upto the authorised limit, his pension is reduced for the remaining part of his life by deducting the commuted portion from the monthly pension.

5. The petitioners have contended that the commuted portion out of the pension is ordinarily recovered within about 12 years and, therefore, there is no justification for fixing the period at 15 years. Commutation brings about

certain advantages. The commuting pensioner gets a lump sum amount which ordinarily he would have received in course of a spread over period subject to his continuing to live. Thus, two advantages are certainly forthcoming out of commutation:–(1) availability of a lump sum amount, and (2) the risk factor. Again many of the State Governments have already formulated schemes accepting the 15 year rule. In this background, we do not think we would be justified in disturbing the 15 year formula so far as civilian pensioners are concerned.

6. The age of superannuation used to be 55 until it was raised to 58. It is not necessary to refer to the age of the commuting pensioner when the benefit would be restored. It is sufficient to indicate that on the expiry of fifteen years from the period of retirement such restoration would take place.

7. The respondent-Government has agreed that this benefit should be extended with effect from 1-4-1986. The writ applications were filed in 1983. The matter was placed on board for hearing in February 1984. The Union Government took some time for responding to the suggestion of the Court and that is how the disposal was initially delayed. Thereafter, the hearing of the matter has again been delayed on account of pressing business in the Court. In these circumstances, we think it just and equitable that the benefit agreed to be extended in respect of the commuted portion of the pension should be effective from 1-4-1985 so far as the civilian employees are concerned.

8. The decision of the respondent-Government contained in the above communication does not cover all classes of Defence personnel, having been confined to personnel of Armed Forces in whose case the retirement age varies in accordance with the colour service prescribed for the rank (attaining the age or 37/38 years or more). In regard to those who are excluded it has been contended that the retirement is at too early an age and since a higher rate of pension as compared to civilian employees is admissible, the benefit contained in the Government order cannot be extended to that class. Previously the retiring age for the lower ranks such as sepoys, used to be after 15 years' service but now it has been enhanced to 20 years' service. A sepoy retiring after 20 years' service is entitled to five years of weightage, for his pension entitlement. Similarly a Naik retiring after 22 years of service and a Havildar after 24 years' service are also given credit of five years. While a civilian employee ordinarily retires after a full term of service entitling him to full pension, it does not happen in the case of the lower ranks in the Defence services and with the extra-advantage by the addition of years of credit, the benefit in terms of money, works out in the range of about 75% to 6%. It has to be remembered that more than 50% of the Defence personnel belong to the lowest rank and about 81% in all retire early. The weightage factor relied upon by the Respondent to treat

R. N. Misra
Judge
Supreme Court of India

the Defence personnel differently is not a tenable feature. Undoubtedly the Defence personnel are a class by themselves. In their case, retirement takes effect in certain classes as justified by exigencies of the service rather early. Weightage, if any, is intended to cover this so that an equation for other purposes could be established. There is ally no merit in the stand of the Respondent that the early age of retirement is fully compensated by the higher rate of pension.

9. In dealing with a matter of this nature, it is not appropriate to be guided by the example of Life Insurance; equally unjust it would be to adopt the interest basis. On the other hand; the conclusion should be evolved by relating it to the 'years of purchase' basis. An addition of two years to the period necesary for the recovery on the basis of years of purchase justifies the adoption of the 15 year rule. That is more or less the basis which appears to be equitable. It may be that this would give rise to an additional burden on the exchequer but it would not be heavy and after all it would bring some i.e. lielf to those who have served the cause of the Nation at great sacrifice. We are, therefore, of the view that no separate period need be fixed for the Armed Forces personnel and they should also be entitled to restoration of the commuted portion of pension on the expiry of 15 years as is conceded in the case of civil pensioners. And for them too the effective date should be from 1-4-1985.

10. We direct the respondent-Government to give effect to this order within a period of three months from now we place on record our appreciation of the consideration shown by the Union of India to ameliorate the hardship of the pensioners. There will be no order as the costs.

order accordingly.

Report No. 108, p. 01

A.P. Sen
Judge
Supreme Court of India

OBSERVATION

(i) Punjab Service of Engineers, Class II P,W.D. (Irrigation Branch Rules, 1970 —Rule 2 (12) Member of Service—Appointment as Temporary Engineer purely on ad hoc basis dehoring the rules—Whether service rendered as such can be counted towards eligibility of 8 years service for promotion in next higher grade .. (No)
(Para 19 & 24)

(ii) Haryana Service of Engineers, Class I, P.W.D. (Irrigation Branch Rules, 1964 (As amended in 1975)—Order of promotion to the post of Executive Engineer on purely ad hoc basis for siz monthes expressly stating interim subject to the rights of other officers—Quashed by High Court—Validity—High Court not right quashing the same.
Para 10

OBSERVED BY

A. P. Sen and
S. Natarajan

Hon'ble Judges, Supreme Court of India.

IN

Civil Appeal No. 149 of 1981 decided on 17-12-1986, between Ashok Gulati & others, Appellants v. B.S Jain & others, Respondents.

TEXT

A, P. Sen J.—In this appeal by special leave, the short question involved is whether respondents Nos. 1 and 2 were entitled to the benefit of the period of service rendered by them as Temporary Engineers on an ad hoc basis in the Irrigation Branch of the Public Works Department, State of Haryana i.e. prior to their appointment as Assistant Engineers on regular basis on April 21, 1975 along with the six appellants and respondents Nos 5-24 for purposes of reckoning their eligibility for promotion to the post of Executive Engineer under r 6(b) read with the Explanation thereto of the Haryana Service of Engineers, Class I, Public Works Department (Irrigation Branch) Rules 1964, as amended in 1975, ('Class I Rules' for short) as also for purposes of their seniority in the cadre of Assistant Engineers.

2. Facts bearing on the question are as follows. In response to an advertisement published in the Daily Tribune of February 6, 1970 inviting applications for appointment as Temporary Engineers on an ad hoc basis, respondent No. 1 B.S. Jain was appointed as a Temporary Engineer (ad hoc) w.e.f. January 2 1971 for a period of six months i.e. after the coming into force

of the Harayana Service of Engineers, Class II, Public Works Department (Irrigation Barnch) Rules, 1970 (Class II Rules' for short) Prior to this respondent No. 2 S.L. Gupta was also appointed as a Temporary Engineer on an ad hoc basis w.e f May 19 1969 by calling his name through the Employment Exchange i.e subsequent to the coming in to force of the Class II Rules. Their appointments were dehors the rules to meet the exigencies of servive. In the letters of appointment issued to them it was specified that their appointment was purely on an ad hoc basis for a period of six months from the date of their ioining the post on a fixed salary of Rs 400 plus allowances and their services were terminable without notice They were specifically informed that the appointment would not entitle them to any seniority or other benefit under the service rules for the time being in force and would also not count towards increment in their salary. They were also intimated that the posts of Temporary Engineers in Class II service would be advertised in due courses by the Haryana Public Service Commission and they should apply for such posts through the Commission, and that if they were not selected by the Commission, their services would be liable to be terminated without notice. Also that their inter se seniority among the Temporary Engineers would be in the order of merit in the list of candidates as settled by the Commisson. The services of respondents Nos, 1 and 2 were however continued by the State Government from time to time, six months at a time, till the Secretary, Haryana, Public Service Commission by his letter dated July 8, 1973 addressed to the Commissioner and Secretary to the State Government of Haryana, Public Works Department (Irrigation Branch) conveyed the approval of the Commission to the ad hoc appointment of 251 Temporary Engineers beyond the period of six months till regular appointment were made to the posts through the Commission. Accordingly, both these respondents continued to hold the posts of Temporary Engineers on ad hoc basis till the end of the year 1974 i e till they were recruited as Assistant Engineers through the Public Service Commission on April 21, 1975 on regular basis.

3. It appears that in response to an advertisement issued by the Public Service Commission in October 1973, respondents Nos. 1 & 2 appeared at a competitive examination along with the appellants and respondents Nos. 5-24 and were selected by the Public Service Commission for appointment as Assistant Engineers under the Haryana Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970 In the letter of appointment issued by the Commissioner and Secretary to Government of Haryana (Irrigation & Power Department) dated January 13, 1975 it was specified that inter se seniority of Assistant Engineers would be determined on the basis of the combined merit list prepared by the Public Service Commission. In the combined merit list prepared by the Commission

respondents Nos. 1 and 2 were placed very much below the appellants and respondents Nos. 5-24 being at serial Nos. 148 and 150 respectively. It may be stated that the merit list prepared by the Commission has never been questioned before us.

4. A few more facts. The State Government of Haryana by order dated December 20, 1978 promoted 62 Assistant Engineers including the appellants respondents Nos. 5-24 as Executive Engineers on a purely ad hoc basis for a period of six months subject to certain terms and conditions, namely : (i) The promotions were subject to the approval of the Public Service Commission as also to the claims of other officers (ii) Such promotions were not to give any right to the officers for being appointed on a substantive basis as Executive Engineers. And (iii) Such of the officers as had not passed the departmental professional and revenue examinations were required to pass Such examinations within a period of one year or otherwise they were liable to be reverted to their original post. These ad hoc promotions of the appellants and respondents Nos. 5-24 were made in relaxation of the provisions contained in rr. 6(b) and 15 of the Haryana Service of Engineers, Class 1, Public Works Department (Irrigation Branch) Rules, 1964. Presumably, the State Government excluded from consideration the case of respondents Nos. 1 and 2 for promotion because in the cambined seniority list they ranked below the appellants Nos. 5-24 being placed at serial Nos. 148 and 150 respectively.

5. The ad hoc promotion of appellants and respondents Nos. 5-24 was assailed by respondents Nos. 1 and 2 by a petition under Art. 226 of the Constitution filed before the Punjab and Haryana High Court mainly on the ground that when qualified persons like them i.e. respondents Nos. 1 and 2 were eligible for being considered for promotion to the post of Executive Engineers r. 6 (d), there was no justification whtaher for the State Government to grant general relaxation under the proviso there of to make the ineligible for persons eligible for promotion in denial of their claims. It was further pleaded that the State Government having relaxed the condition of eligibility under the proviso to r 6(b) read with the Explanation thereof as regards eight years service in the case of promotion of the appellants and respondents Nos. 5-24 as Executive Engineer on an ad hoc basis, failed to appreciate that respondents Nos. 1 and 2 who were recruited along with them and had also put in more or less $3\frac{1}{2}$ years service as Assistent Engineers became entitled to the benefit of such relaxation and the action of the State Government is not considering their cases for such promotion was wholly arbitrary and was tantamount to denial of equal opportunity unity in the matter of employment in violation of Arts. 14 and 16 (1) of the Constitution. It was also pleaded that the power conferred on the State Government to grant relaxation under r. 22 was not a general power but a power to mitigate hardship in a particular case and thus the general relaxa-

tion granted by the State Government to some of the respondents who had not passed their departmental, professional and revenue examinations was invalid. It was asserted that the State Government and Engineer-in-Chief, Irrigation Department, Haryana had wrongly treated respondents Nos. 1 and 2 as ineligible for promotion on the ground that the period from January 1971 and May, 1969 upto April 21, 1975 i. e. the period during which respondents Nos. 1 and 2 remained employed as Temporary Engineers on ad hoc basis, could not be treated as period in that class of service within the meaning of r. 6 (b) i.e. in Class II service.

6. The specific stand taken by the State Government in the return filed before the High Court was that respondents Nos. 1 and 2 were recruited to the post of Assistant Engineer on April 21, 1975 and thus had only about 3½ years service on December 20, 1978 to their credit when appellants and respondents Nos 5-24 were promoted as Executive Engineers on an ad hoc basis. Prior to their appointment as Assistant Engineers, respondents Nos. 1 and 2 had been appointed as Temporary Engineers on ad hoc basis dehors the rules and under the terms of appointment they were not entitled to any seniority or other benefit under the service rules as a result of such appointment. Further it was pleaded that respondents Nos. 1 and 2, in the seniority list prepared by the Public Service Commission were ranked junior to the appellants and respondents Nos. 5-24 and therefore they were not entitled to be considered for promotion.

7. A learned Single Judge (R. N. Mittal, J) by his judgment dated October 8, 1980 quashed the impugned order of the State Government making ad hoc promotion of the appellants and respondents Nos. 5-24 and directed the State Government to reach a decision afresh as regards the ad hoc promotions with advertence to the observations made by him. In his judgment the learned Single Judge repelled the contention of respondents Nos. 5-24 for being considered for promotion since none of them had completed eight years' service as Assistant Engineer on the ground that the State Government was empowered in terms proviso to r. 6 (b) to relax generally, in public interest, the conditions regarding eight years' experience for reasons to be recorded in writing. He found on perusal of the records placed before him that reasons for the relaxation in public interest of the condition of eight years service imposed by rules 6 (d) had in fact been recorded for reducing the period to 3½ years in consultation with the Finance Department. He accordingly held that the ad hoc promotion of the appellant and respondents Nos. 5-24 was not invalid on that account. The learned Single Judge however accepted the contentiod of respondents Nos 1 and 2 that they were entitled to the benefit of the period of continuous officiation as Temporary Engineers on ad hoc basis from January 1971 and May 1969 to April 21, 1975 in reckoning eight

years experience in that class of service within the meaning of r. 6 (d) i. e. Class II service by reason of Explanation to r. 6 (b) and were therefore eligible for promotion to the post of Executive Engineer under r. 8(2) in view of the definition of the expression 'Temporary Engineer' contained in rule 2 (5); as amended in 1975. He also upheld their contention that the power conferred on the State Government under r. 22 was not a general power of relaxation but a power exercisable only to mitigate any undue hardship in the case of a particular individual and therefore the impugned order of the State Government permitting relaxations in the case of respondents Nos. 9, 10 and 11 Gyan Singh, P.D. Kadian and C.P. Goel as regards the passing of the departmental professional and revenue examinations as required by r. 15 was invalid Upon that view, the learned Single Judge allowed the Writ Petition and quashed the impugned order of the State Government for the ad-hoc promotion of the appellants and respondents Nos 5-24 as Executive Engineers. Incidentally, the judgment of the learned Single Judge leaves untouched the impugned order insofar as it relates to the ad hoc promotion of 37 Assistant Engineers to the post of Executive Engineer.

8. Thereupon, the appellants preferred an appeal under clause 10 of the letters patent but the appeal was dismissed in limine by a Division Bench (P.C. Jain and C.S. Tiwana, JJ.) by its order dated November 6, 1980. The learned Judges stated that they were in full agreement with view expressed by the learned Single Judge. The appellants apparently advanced a contention that the appointment of respondents Nos. 1 and 2 as Temporary Engineers on an ad hoc basis was contrary to para 8 312 of the manual of Admininstration and therefore the period during which they worked as Temporary Engineers (ad hoc) could not be taken into consideration. The learned Judges repelled the contention on the ground that no such point was taken before the learned Single Judge.

9. We must at the very outset observe that the judgment of the learned Single Judge quashing the impugned order of the State Government for the promotion of the appellants and respondents Nos 5-24 as Executive Engineers on an ad hoc basis on the ground that the State Government could not have relaxed the condition of passing the departmental professional and revenue examinations prescribed under rule 15 of the Class I Rules by taking recourse to rule 22 which did not confer a general power of relaxation can hardly be sustained. We are afraid, the learned Single Judge was completely misled in taking the view that he did. This was not a case of relaxation at all but a question of prescribing the period during which such examinations had to be cleared as required under rule 15 Rule 15 in terms provides that the departmental professional and revenue examinations for purposes of promotion to the Class I service have to be passed

within such period as may be prescribed. The word 'prescribed' in rule 15 clearly empowers the State Government to provide for the period during which the promoted officers had to pass the departmental test. In terms of that rule, the State Government by the impugned order directed that the officers who had not passed the departmental professional and revenue examinations were required to pass such examinations within a period of one year otherwise they were liable to be reverted to their original post. It must be said in all fairness that learned counsel for respondents Nos. 1 and 2 did not support this part of the judgment.

10. After having heard learned counsel for the parties quite at some length in a hearing lasting over several days, we feel that irrespective of the merits of the contentions advanced, no useful purpose would be served in maintaining the judgment of the High Court insofar as it quashes the impugned order of the State Government, dated December 20, 1978 for the promotion of the appellants and respondents Nos. 5-24 as Executive Engineers on ad hoc basis after a lapse of such a long time as it would create unnecessary administrative complications. During the hearing we expressed our doubts about the wisdom of the High Court in entertaining the Writ Petition of respondents Nos. 1 and 2 particularly when the impugned order of the State Government making promotion of the 62 Assistant Engineers including the appellants and respondents Nos. 5-24 as Executive Engineers was purely on an ad hoc basis for a period of six months and expressly made subject to the rights of other officers. Instead of interfering with the impugned order of the State Government the proper course for the High Court should have been to issue a direction to the State Government to consider the cases of the eligible officers including respondents Nos. 1 and 2 for ad hoc promotion as Executive Engineers if their turn was due for such promotion according to their placement in the seniority list and it should have in the meanwhile allowed the appellants and respondents. Nos. 5-24 to continue in their posts as Executive Engineers (ad hoc) subject to the condition that while considering their cases for promotion the State Government would not take that circumstance into consideration that they had continued to function as Executive Engineers on an ad hoc basis.

11. That course commends to us for another reason as well. Although the High Court by its judgment and order dated October 8, 1980 quashed the impugned order of the State Government dated December 20, 1978 making the ad hoc promotions and issued a direction that the Government should reach a decision afresh in the matter, the fact remains that neither the judgment of the High Court nor the directions made by it have taken effect. On the contrary, this Court while granting special leave on January 14, 1981 stayed the operation of the judgment of the High Court. As a consequence, the result has been that the appellants and respondents Nos. 5-24 have continued

to function as Executive Engineers on an ad hoc basis for the last about eight years under the interim order of stay. Incidentally, the judgement of the High Court leaves untouched the promotion of 37 Assistant Engineers and Executive Engineers. The State Government will also have to give effect to the decision of the Court in A. S. Parmar v. State of Haryana laying down that a degree in Engineering was not an essential qualification for promotion of Assistant Engineers in the Irrigation Branch to the cadre of Executive Engineers in Class I service under rule 6 (d) of the Class I Rules and therefore the Assistant Engineers who are diploma holders are equally eilgible for such promotion. The State Government in the Public Works Department (Irrigation Branch) by a notification dated June 22, 1984 purported to effect an amendment to rule 6 (b) of the Class I Rules with a view to nullify this decision of this Court in A. S. Parmar's case By a separate judgment in the connected Writ Petitions Nos. 630. 32/84 delivered today, we have struck down the impugned notification as offending against Articles 14 and 16 (b) of the Constitution and also as ultra vires the State Government by reason of the proviso to section 82 (6) of the Punjab Reorganisation Act, 1966. It appears that the State Government has been treating a degree in Engineering referred to in Class (b) of rule 6 as an essential qualification for promotion to the post of Executive Engineer in Class I service in the case of officers in Class II service presumably on the view expressed by the Punjab and Haryana High Court in O. P. Bhatia v. State of Haryana 1980 SLJ 126. The controversy was settled by the decision of this Court in A. S. Parmar's case and it overruled the decision of the High Court in O. P. Bhatia's case and held on a consideration of the relevant rules that the qualification of degree in Engineering was not necessary in the case of officers in Class in Class II service for promotion to the post of Executive Engineer. That apart, we must deal with the appeal on merit as the judgment of the High Court leaves much to be desired.

12. Issues raised in this appeal by special leave are of far-reaching significance to the civil services. It involves a claim by persons who had been in employment in the Government service on a purely ad hoc basis dehors the rules that they were entitled upon their absorptions to the post on a regular basis, to the benefit of the period of their continuous officiation as temporary employees on ad hoc basis for determining their eligibility for promotion to the higher grade or post. The questions presented are whether the principles laid down in N. K. Chauhan and Others v. State of Gujarat and Others 1977 SLJ 110. and S.B. Patwardhan and Others. v. State of Maharashtra and Others, 1979 SLK 421 reiterated in Baleshwar Dass and Others v. State of Uttar Pradesh; and Others 1981 (1) SLJ 223 and subsqeuently followed in several decisions, that ordinarily in the absence of any specific rule of seniority governing the cadre or service, the length of conti-

nuous officiation should be counted in reckoning seniority as between direct recruits and Promotees, should also be extended in determining seniority of such ad hoc employees vis-a vis direct recruits, and whether the failure on the part of the Government to count the entire period of officiation as such ad hoc employees would be per se arbitrary and irrational and thus violative of Articles 14 and 16(1) of the Constitution inasmuch as the temporary service in the post in question was not for a short period intended to meet some emergent or unforeseen circumstances, but to meet the exigencies of the service. It is asserted that the recent pronouncement of this Court in the case of Narendra Chandha and Others. v. Union of India and Others (1986) 2 SCC 157, supports this view. This argument at first blush appears to be plausible but on deeper consideration is not worthy of acceptance. We proceed to give reasons therefor.

13. We are not aware of any principle or rule which lays down that the length of continuous officiation/service is the only relevant criterion in determining seniority in a particular cadre or grade, irrespective of any specific rule of seniority to the contrary. It is necessary to emphasise that the principles laid down in the two leading case of N. K. Chauhan and S.B. Patwardhan, reiterated in Baleshwar Dass' case and subsequently followed in serveral decisions are not an authority for any such proposition. These decisions particularly that in Baleshawar Dass' case clearly laid down that ordinarily and in the absence of any specific rule of seniority governing the cadre of service, the length of continuous officiation should be counted in reckoning seniority as between direct recruits and promotees. These authorities nowhere lay down that the same principle i. e. the length of continuous officiation must be the sole guiding factor and the only criterion in determining seniority of such ad hoc employees vis-a-vis direct recruits.

14. The contention on behalf of the appellants firstly is that the High Court was clearly in error in holding that the entire period of service of respondents Nos. 1 and 2 as Temporary Engineers on ad hoc basis i e. the period from January 1971 and May 1969 to April 21, 1975 had to be counted not only for purposes of their seniority under rule 8(2) of the Class 1 Rules but also for the purpose of their eligibility for promotion to the post of Executive Engineers under rule 6 (b). It is said that the High Court failed to appreciate that respondents Nos. 1 and 2 were not recruited as Temporary Engineers under the instructions contained in the Manual of Administration issued under the Punjab Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1941 or under the Punjab Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970, but their appointment as Temporary Engineers was purely on an ad hoc basis de hors the rules and there fore they did not fall within the ambit of the definition of the expression Class

II Service' as defined in rule 2(5), as amended in 1975. Secondly, the High Court failed to take into account the fact that respondents Nos. 1 and 2 became members of Class II service only on April 21, 1975 when they were recruited as Assistant Engieers on a regular basis through the Public Service Commission. Till then they did not answer the description of Temporary Engineers, as defined in rules 2(5). They did not even figure in the notification dated May 18, 1982 issued by the State Government under rule 3 constituting the service of Engineers as Class II service w.e.f December 25, 1970. It must therefore logically follow that the service rendered by them as Temporary Engineers on ad hoc basis prior to their recruitment as Assistant Engineers in 1975 could not be treated to be service in that class within the meaning of rule 6(b) of the Class I Rules. Likewise, rule 8(2) which speaks of any service rendered as Temporary Engineer must be construed accordingly as manning service rendered by a Temporary Engineer recruited in the manner provided by the instructions contained in Manual of Administration issued under the 1941 Rules or recruited as such under the 1970 Rules. Laslty, the decision in Baleshwar Dass' case does not lay down any proposition that persons employed on a purely ad hoc or fortuitous basis like respondents Nos. 1 and 2 are entitled as a matter of law to the benefit of their period of ad hoc service and the two later decisions in G.P. Doval and Others v. The Chief Secretary, Government of Uttar Pradesh and Othere 1984 (2) SLJ 166, and Narendra Chadba are of little assistance. These submissions, in our opinion, must prevail.

15 In reply, the main contention of learned counsel for respondents Nos. 1 and 2 is that respondents Nos. 1 and 2 upon their absorption to the post of Assistant Engineer on a regular basis on April 21, 1975 were entitled to the benefit of the entire period of officiation as Temporary Engineers on an ad hoc basis i e. the period from January 1971 and May 1969 to April 21, 1975 and the failure of the Government to count such period of their ad hoc service was per se arbitrary, irrational and thus violative of Articles 14 and 16 (1) of the Constitution inasmuch as the service rendered by them as Temporary Engineers (ad hoc) was not for a short period intended to meet some emergent or unforeseen circumstances, but to meet the exigencies of the service and there is no reason why the principle laid down in Baleshwar Dass' case should also not be extended in determining the seniority or such ad hoc employees vis-a-vis direct recruits Secondly, he contends that exercise of the power of relaxation of the condition of eight years' service for pusposes of eligibility conferred on the State Government under the proviso to rule 6 (b) is conditioned by the obligation to record reasons in writing which requirement was mandatory. There was failure on the part of the Government to record reasons therefore or to indicate any basis

to show that such relaxation was in public interest. Further, the words, Class II Service' in rule 8(2) must bear the same meaning as the expression' Class II Service' as defined in rule 2(5). The artificial definition of 'Class II Service' introduced by amendment of rule 2(5) in 1975 was obviously to bring persons who were not Assistant Engineers i. e. members of Class II service within the zone of consideration for purposes of promotion to the post of Executive Engineer under rule 6(b) of Class I Rules. Furthermore, the State Government having relaxed the condition of 8 years' service by recourse to the proviso to rule 6 (b), respondents Nos 1 and 2 were similarly situated as appellants and respondents Nos. 5-24 as they were all recruited together as Assistant Engineers in Class II service in 1975 and they had all rendered about 3½ years' service in that class and therefore failure on the part of the State Government to consider the case of respondents Nos. 1 and 2 for purposes of promotion to the post of Executive Engineer was tantamount to the total exclusion of a class within a class and was thus per se discriminatory. Lastly, the action of the State Government in making ad hoc promotion of appellants and respondents Nos. 5-24 was wholly mala fide. Learned counsel wanted us to draw an inference of mala fide from the fact that the Private Secretary to Chief Minister was present at a meeting held in the room of the Irrigation Minister where the list of promotion was settled. It is suggested that initially the names of respondents No 1 and 2 figured in the list but later on wholly extraneous considerations their names were deleted.

16. It would be convenient at this stage to refer to the relevant provisions of the Punjab Service of Engineers Class I, P.W.D. (Irrigation Branch) Rules, 1964, as amended in 1975. The amendment effected in 1975 substituted a new rule 2(5) for the existing rule 2(5) and it defines the expression 'Class II Service' as follows :

> "2(5). 'Class II Service' shall, for the purpose of promotion to the service, comprise of members of the Haryana Service of Engineers' Class II (Irrigation Branch) Temporary Engineers' Officiating Sub-Divisional Officers and Officiating Assistant Design Engineers, except those promoted in excess of the quota fixed under rule 6 of the Haryana Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970."

The qualifications of persons eligible for appointment are prescribed in rule 6 which is in these terms :

> "6. Qualifications : No person shall be appointed to the service unless he—
>
> (a) Possesses one of the University Degrees or other qualifications prescribed in Appendix B of these Rules
>
> Provided that Government may waive this qualification in the

case of a particular officer belonging to Class II Service;

(b) In case of an appointment by promotion from Class II Service, has completed in that class of service for a period of ten years from the commencement of these rules, six years service and after that period eight years service;

Provided that if it appears to be necessary to promote an officers in the public interest, the Government may, for reasons to be recorded in writing either generally or in any individual case reduce the period of six or eight years in such extent as it may deem proper in consultation with the Finance Department.

Explanation :—For the purpose of this clause in computing of the period of six or eight years any service renderd as a Temporary Engineer shall be taken into account."

We may next set out rule 8 which deals with the method of promotion :

"8. Appointment by promotion : (1) A Committee consisting of the Chairman of the Public Service Commission and where the Chairman is unable to attend any other member of the Commission representing it, the Secretary, P.W.D. (Irrigation Branch) and the Chief Engineer, Punjab, P. W. D. (Irrigation Branch, shall be constituted.

(2) The Government shall prepare a list of eligible and suitabie persons for promotions in order of their seniority in Class II Service, which shall be reckoned :

(a) in the case of a member of the Haryana Service of date of Engineers, Class II (Irrigation Branch) from the date of his continuous officiation as Sub-Divisional Officer or Assistant Design Engineer or appointment as Temporary Engineer, as the case may be :

(b) in the case of a Temporary Engineer from the date of his appointment as such."

17. As a matter of construction, the words 'Class II service' in rule 8 (2) introduced by amendment in 1975 must be consrtued to have the same meaning as the expression 'Class II service' as defined in rule 2(5). We find the language employed by the framers of the rules in the definition clause in rule 2(5) has been departed from in the definition of the expression 'Class II service' and it is generally but not always a fair presumption on that the alteration in the language used in the new definition in rule 2(5) was intentional. Prior to the amendment in 1975, the expression, 'Class II Service' as defined in rule 2(5) meant the members of Class II service including Temporary Engineers. As the State

stood in need of many more Executive Engineers it became essential to take steps to recruit not only persons who strictly belong to Class II Service proper but also to bring within the zone of consideration others who are not members of Class II Service e.g. Offg. Sub-Divisional Officers and Offg. Assistant Design Engineers who would not be so included. The key to the interpretation of the definition clause in rule 2(5) is the words "for the purpose of promotion". The effect of the enlarged definition of Class II Service in rule 2(5) is that these words when found in the Act must, for the purpose of promotion, be understood in that context in a certain sense i.e. to include not only members Class II Service including Temporary Engineers but also Offg. Sub-Division Officers and Offg. Assistant Design Engineers who but for the interpretation clause, would not be so included. That would be in consonance with the purpose and object of the amendment. There is reason why the words 'Class II Service' in rule 8(2) introduced in 1975 must bear same meaning as the expression 'Class II Service' as defined in rule 2(5) as both the provisions deal with the same subject i.e. promotion of members of Class II Service to the post of Executive Engineer in Class I Service. The mode of promotion to the post of Executive Engineer is as laid down in rule 8(2), Now, rule 8(1) remains unaltered. Rule 8(1) directs that a committee consisting of the Chairman of the Public Service Commission or where the Chairman is unable to attend any other member of the Commission representing it, Secretary to the Government, P.W D. (Irrigation Branch), and the Chief Engineer, Punjab, Irrigation Branch shall be constituted. Under rule 8(2) introduced in 1975, the Government has to prepare a list of eligible and suitable persons for promotion in order of their seniority in Class II Service which shall be reckoned (a) in the case of a member of the Haryana Service of Engineers, Class II, Irrigation Branch, from the date of his continuous officiation as Sub-Divisional Officer or Assistant Design Engineer or appointment as Temporary Engineer, as the case may be (b) In the case of Temporary Engineer from the date of his appointment as such. These provisions can lead to no other conclusion but that the list of eligible and suitable persons for promotion has to be drawn not only comprising of regular members of Class II Service including Temporary Engineers in order of their seniority but also of Offg. Sub-Divisional Officers or Offg. Assistant Design Engineers in that class of service from the date specified therein. Apparently, the requiraments of rule 8 (1) and 8(2) have not been complied with. All that exists is the combined seniority list of Assistant Engineers belonging to Class II Service in order of their seniority prepared by the Public Service Commission which incidentally has never been challenged.

18. The meaning of the word as' in the collocation of the words, any service rendered as a Temporary Engineer' in Explanation to rule 6(d) of the

Class I Rules must obviously mean 'in the capacity of' In Dr. Asim Kumar Bose v. Union of India and others 1983 (1) SLJ 203, the question was whether the appellant who was a Radiologist in the Maulana Azad Medical College which was a post belonging to Specialist Grade II could be appointed to the post of Professeor of Radio-Therapy in that College by direct recruitment under rule 8(2) of the Central Health Service (Amendment) Rules, 1966. In 1971 there were certain amendments in the Rules prescribing the made in which the posts of Professor and Associate Professor could be filled in and paragraphs 2(b) and 3 of Annexure I to the Second Schedule and sub-rule (2a) to rule 8 were inserted which brought about a change. These amendments brought about a change inasmuch as they provided for a vertical channel of promotion to the teaching post upto the post of Associate professor. At page 363 of the Report this Court referred to the report of the Third Pay Commission where it was observed at page 173 :

> "While the Specialists on the teaching side can hold posts of hospital specialists, the latter cannot be promoted to teaching posts because of lack of teaching experience."

Presumably, the Ministry of Health on that view held that the word 'as' in paragraphs 2(b) and 3 of Annexure I to the Second Schedule and sub-rule (2a) of rule 8 makes holding of a post in the cadre a condition precedent to the post of a Professor or an Associate Professor. In that context, it was observed :

> "Normally, a Professor or an Additional Professor in a medical college or a teaching institution can be appointed by direct recruitment from amongst persons holding the post of Associate Professor or Assistant Professor in the concerned speciality in a medical college or a teaching institution having at least six years' teaching experience out of 12 years' standing the Grade through the Union Public Service Commission. Associate Professor in the medical college or a teaching institution can only be promoted from amongst persons holding the post of Reader or Assistant Professor having at least five years' teaching experience in the concerned speciality the Departmental Promotion Committe. We are inclined to the view that the word "as" in the collocation of the words used "at" least six years' experience as Associate Professor/Assistant Professor/Reader" in paragraph 2(b) and the words "at least five years' experience as Reader/Assistant Professor" in paragraph 3 and sub-rule (2-A) of Rule 8 must be interpreted in its ordinary sencse as meaning teaching experience gained "in the capacity of". In Black's Law Dictionary, 5th Edition, page 104, the meaning of the

word "as" as given is : "Used as an adverb, etc., means like, similar to, of the same kind, in the same manner in which." In Shorter Oxford Dictionary, 3rd Edition, page 111, the word "as" is stated to mean : "The same as, in the character, capacity, role of".

In spite of all this, the contention of respondents Nos. 1 and 2 that they were entitled to the benefit of period of service rendered by them as Temporary Engineer on an ad hoc basis w.e.f. January 2, 1971 and May 19, 1969 respectively prior to their appointment as Assistant Engineers on regular basis on April 21, 1975 for purposes of reckoning their eligibility under rule 6 (b) read with the Explanation there to of the class I Rules as also for purpose of their seniority in the cadre of Assistant Engineers, cannot prevail. They were not recruited under paragraphs 8. 312 to 1. 316 of the Manual of Administration, Public Works Department. In the erstwhile State of Punjab there was a distinct class of Engineers designated as Temporary Engineers. All persons to appointed as Temporary Engineers had face the Public Service Commission for selection for to the post under rule 4 and 5 the Punjab Service of Engineers, Class II, P. W D. (Irrigation Branch) Rules, 1941. Under the Rules, the term 'Temporary Engineer' was defined in rule 2 (f) to mean engineer in the service of the Public Works Department, Punjab whose appointment was temporary within the meaning of the Fundamental Rules, was pensionable and who was not a member of any regular service. The word 'service' as defined rule 2 (g) of the Rules meant the Punjab Service of Engineer, Class II, Irrigation Branch, Rule 5 provided that no Temporary Engineer could be taken into service or member of the Overseers Engineering Service, Punjab promoted unless he had been declared by the Commission on the report of the Chief Engineer to be fit for the service, was serving the Department and held an appointment for not less than two years continuously before the date of entry into the service.

19. Next came the Punjab Service of Engineers, Class II, P. W. D. (Irrigation Branch) Rules, 1970. The expression 'member of service' was defined in rule 2 (12) to mean an officer oppointed substantively to a cadre post. The definitions of the word 'service' and of the term 'Temporary Engineer in rule 2 (15) and (16) remained the same except for the difference that the word 'temporary' carried the meaning as given in the Civil Service Regulations in place of the Fundamental Rules. Rule 6 provided for the manner of recruitment of Temporary Enigineers from different sources, in the proportions and the order indicated. Sub-rule (3) thereof provided that in case candidate was not available from sources 1 and 3 i. e. by direct recruitment or by promotion, and a person had to be appointed in public interest, as a stop-gap arrangement, the period of service rendered by such person shall not be reckoned for the purpose of seniority. Sub-rule (4)

provided that the Government could fill a short term vacancy in the exigencies of public service, after recording specific reasons, for the period not exceeding six months from the Overseers Engineering Service, Irrigation Branch. It is quite apparent under these rules that appointment of respondents Nos. 1 and 2 as Temporary Engineers on an ad hoc basis was de hors the rules.

20. It may seem to be some illogical that though respondents Nos. 1 and 2 were appointed as Temporary Engineers on an ad hoc basis, they should be deprived of the period of their officiation as such till they were absorbed to the post of Assistant Engineer on a regular basis through the Public Service Commission on April, 1975. That is a legal consequence which cannot be avoided on well settled principles. In their case the length of continuous officiation cannot be the basis for reckoning their seniority since they never became members of Class II Service prior to their absorption. On the terms of appointment of respondents Nos. 1 and 2, it was specifically provided that their appointment was purely on an ad hoc basis for a period of six months from the date of their joining the post on a fixed salary of Rs.400/- allowances that their services were liable to be terminated without notice. It was also specifically mentioned that the appointment as such Temporary Engineers on ad hoc basis would not count towards seniority or increment in their salary. It was further stated that the posts of Temporary Engineers in Class II Service would be advertised in due course by the Public Service Commission and that if they were not selected by the Commission, their services would be terminated without notice. They were also intimated that their inter-se seniority among the Temporary Engineers so recruited would be in the order merit in the list of candidates as settled by the Commission. It is common ground that respondents Nos. 1 and 2 were not recruited through the Public Service Commission. It was not till July 8, 1983 that the Secretary to the Commission conveyed to the State Government the approval of the Commission to the ad hoc appointment of 251 Temporary Engineers beyond the period of six months till regular appointments were made in the posts of Assistant Engineers through the Commission. These are the facts on which there is no doubt or difficulty as to the principecs applicable.

21. According to the accepted canons of service jurisprudence, seniority of a person appointed must be reckoned from the date he becomes a member of the service. The date from which seniority is to be reckoned may be laid down by rules or instructions (a) on the basis of the date of appointment (b) on the basis of confirmation (c) on the basis of regularisation of service (d) on the basis of the length of service, or (c) on any other reasonable basis. It is well-settled that an ad hoc or fortuitous appointment on a temporary or stop-gap basis cannot be taken into account for the purpose of seniority even if the appointee was qualified to hold the post on a regular basis, as

such temporary tenure hardly counts for seniority in any system of service jurisprudence. In somewhat similar circumstances, in the case of State of Gujarat v. C.G. Desai and others 1974 SLJ 490, the question for consideration was whether in the case of Deputy Engineers directly recruited through the Public Service Commission by competitive examination, the service, if any, rendered by them as officiating Deputy Engineers prior to their appointment to Class II Service i. e. during the preselection period, could be taken into account for purposes of their eligibility for promotion as Executive Engineers under rule 7(2) of the Bombay Engineering Service Rules, 1960 which provided for a period of 7 years' experience in Class II Service. The Government stand was that the service rendered by the direct recruits prior to their appointment to the Class II Service could not be taken into account in computing their eligibility of 7 years' experience in that class of Service and the Court upheld the stand. It was contended on behalf of the promotees that if for promotion to the post of Executive Engineer in Class I Service the period of eligibility of 7 years' experience in Class II Service was to start from the date of absorption in that class of service, then for most of them there would be rare change of ever getting promotion as officiating Executive Engineers and as many of them had less than 7 years to go before attaining the age of superannuation. The contention was that rule 7 (2) of the Rules did not permit discrimination between the promotees and direct recruits in the matter of computing 7 years' service for further promotion as officiating Executive Engineers. The contention was repelled on the ground that direct recruits and promotees in Class II Service constituted two distinct groups or classes and the classification was based on intelligible differentia, and it was observed :

> "If a person, like any of the respondents, to avoid the long tortuous wait leaves his position in the "never ending' queue of temporary/Officiating Deputy Engineers etc. looking for promotion, and takes a short cut thrugh the direct channel, to Class II Service, he gives up once for all, the advantages and disadvantagese go with the channel of promotion and accepts all the handicaps and benefit which attach to the group of direct recruits. He cannot after his direct recruitment claim the benefit of his pre-selection service and thus have the best of both the words. It is well-settled that so long as the classification is reasonable and the persons falling in the same class are treated alike, there can be no question of violation of the constitutional guarantee of equal treatment."

In taking that view, the Court avoided a doctrinaire approach and approached the problem from a pragmatic view. It was said :

> 'If the claim of the respondents to the counting of their pre-selection service is conceded, it will create serious complications in running the administration; it will result in inequality of treatment rather than in removing. If the pre-selection service as Officiating Deputy Engineers of direct recruits having such service, is taken into account for the purpose of promotion, it would create two classes amongst the same group and result in discrimination against those direct recruits who had no such pre-selection service to their credit"

22. It would be repugnant to all accepted concepts of service jurisprudence if the claim of persons like respondents Nos 1 and 2 who were employed as Temporary Engineers on ad hoc basis de hors the rules for six months at a time were extended the benefit of their continuous officiation as such ad hoc employees in reckoning their seniority vis-a-vis direct recruits in considering their eligibility under Rule 6(b) of the class I Rules for promotion to a higher grade or post of Executive Engineer. In A P.M. Mayakutty etc. v. Secretary, Public Service Department 1977 SLJ 206, the question was whether the period of service rendered by such ad hoc employees appointed under rule 10(a)(i)(1) of the Madras State and Subordinate Service Rules purely on an ad hoc basis and as a matter of stop-gap arrangement, were entitled to count for the purpose of seniority, their period of service on ad hoc basis during which they served in a stop-gap arrangement. It was held that such service could not taken into account for the purpose of seniority from the date of their initial appointment. The Court speaking through Chandrachud, C. J. after referring to the provision contained in rule 10(a) (i) (1) of the Rules stated :

> "This provision contemplates the making of temporary appointments when it is necessary in the public interest to do so to an emergency owing which has arisen for filling a vacancy immediately. Such appointments, in terms, are permitted to make otherwise than in accordance with the rules. The letters of appointment issued to the appellants mentium expressly that they were appointed under 10 (a) (i) (1), that the appointments were "purely temporary necessitated on account of the non-availability of regularly selected candidates conferring no claim for future appointment as Junior Engineers and that the appointment is liable to be terminated at any time without previous notice" In face of the provisions of the rule and the terms of the appointment it seems to us that the appellants were appointed purely as a matter of stop-gap or emergency arrangement. Since such service cannot be taken into account for purposes of seniority,

> the appellants cannot contend that the entire service rendered by them from the date of their initial appointment must count for purposes of seniority."

The Court distinguished the case of C.P. Damodaran Nayar v. State of Kerala and Others 1974 SLJ 195 on the ground that the temporary service rendered by a District Munsiff recruited in a regular manner through the Public Service Commission could not, by any stretch of imagination, be considered to be purely as a matter of fortuitous or stop gap arrangement. The distinguishing features in Mayakutty's case, in the words of Chandrachud, CJ. were :

> "The distinguishing feature of that case, which is highlighted in the judgment of the Court, is that the appellant therein was "appointed in a regular manner through the Public Service Commission" and therefore his appointment could not "by any stretch of imagination" be described as having been made to fill a purely stop-gap of fortuitous vacuom. In our case the initial appointment was not only made without any reference to the Public Service Commission but the various rules and the terms of the appellants' appointment to which we have drawn attention show that the appellants were appointed purely as a matter of fortuitous or stop-gap arragement. The concurrence of the Public Service Commission to the continuance of the appellants in the posts filled by them first after the expiry of three months and then after the expiry of one year, was obtained not the with a view to regularising the appointments since their inception but for the purpose of meeting the requirements of a provision under which such concurrence is necessary to obtain if an appointment made with out selection by the Public Service Commission is required for any reason to be continued beyond three months or a year."

That precisely is the case here. It must therefore be held that the period of service rendered by person like respondents Nos. 1 and 2 were appointed on ad hoc basis purely as a stop gap arrangement for six months at a time de hors the rules, cannot be considered for purpose of their seniority in Class II Service or in reckoning their eligibility of 8 years' service in that class of service under rule 6 (b) of Class I Rules.

23. We feel it necessary to emphasise that the principles laid down by this Court in the two cases of N. K. Chauhan and S. B. Patwardhan which were reiterated in Baleshwar Dass' case and subsequently followed in several other cases do not lay down any principle to the contrary. These cases are not an authority for the proposition relied upon On the contrary, they clearly proceed on the principle that persons appointed on an ad hoc basis or fortuitous reasons or by stop-gap arrangement,

constitute a class which is separate and distinct from those who are appointed to posts in the service in strict conformity with the rules of recruitment. In the case of S. B. Patwardhan, Chandrachud, CJ. observed :

> "We however hope that the Government will bear in mind the basic principle that if a cadre consists of both permanent and temporary employees, the accident of confirmation cannot be an intelligible criterion for determining seniority as between direct recruits and promotees. All other factors being equal, continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from different sources, so long as they belong to the same cadre, discharge similar functions and bear similar responsibilities."

In Baleshwar Dass' case, Krishna Iyer, J. affirmed the principle in his own charismatic and picturesque language :

> "We must emphasise that while temporary and permanent posts have great relevancy in regard to the career of government servants, keeping posts temporary for long sometimes by annual renewals for several years, and denying the claims of the incumbents on the score that their posts are temporary makes no sense and strikes us as arbitrary, especially when both temporary and permanent appointees are functionally identified. If in the normal course, a post is temorary in the real sense and the real sense and the appointee knows that his tenure cannot exceed the post in longevity, there cannot be anything unfair or capricions in clothing him with no rights. Not so, if the post is, for certain departmental or like purposes, declared temporary, but it is within the ken of both the Government and the appointee that the temporary posts are virtually long-lived. It is irrational to reject the claim of the 'temporay' appointee on the nominal score of the terminilogy of the post. We must also express emphatically that the principle which has received the sanction of this Court's pronouncements is that officiating service in a post for all practical purposes of seniority as good as service on a regular basis. It may be permissible, within limits, for government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules in that regard are clear and categories and do not admit of any ambiguity and cruelly arbitrary cut-off of long years of service does not take place or there is functionally and qualitatively, substantial difference in the

> two types of posts. While rules regulating condition of service are within the executive Power of the State or its legislative power under proviso to Article 309, even so such rules have to be reasonable, fair and not grossly unjust if they are to survive the test of Articles 14 and 16"

We must also refrr to the decision in A. Janardhana v. Union of India and others 1983 (1) SLJ 564. where Desai, J. had occasion to observe :

> "In other words after having rendered service in a post inlcuded in the service, he is hanging outside the service, without finding a berth in service, where as directs recruits of 1976 have found their place and berth in the service. This is the situation that stares into one's face while interpreting the quota-rota rule and its impact on the service of an individual. But avoiding any humanitarian approach to the problem, we shall strictly go by the relevant Rules and precedents and the impact of the Rules on the members of the service and determine whether the impugned seniority list is valid or not. But, having done that we do propose to examine and expose an extremely undesirable, unjust and inequitable situation emerging in service jurisprudence from the precedents namely, that a person already rendering service as a promotee has to go down below a person who comes into service decades after the promotee enters the service and who may be schoolian, if not in embryo, when the promotee on being promoted on account of the exigencies of service as required by the Government started rendering service. A time has come to recast service jurisprudence on more just and equitable foundation by examining all precedents on the subject to retrieve this situation"

To the same effect are the decisions in O P. Singla v. Union of India (1984) 4 SCC 450. G S Lamba v. Union of India 1985 (1) SLJ 676 P S. Mahal v. Union of India 1984 (2) SLJ 197. and Pran Krishna Goswami & others v. State of West Bengal and others (1985) Supp. SCC 222. It must now be taken as well established after these decisions that in the absence of any other valid principle of seniority, the inter se seniority between direct recruits and promotees should as far as far as possible be determined by the length of continuous service whether temporary or permanent in a particular grade or post (this should exclude periods for which an appointment is held in a purely stop-gap or fortuitous arrangement) No doubt, there are certain observations in the two cases of G. P. Doval and Narender

Chadha which seem to run counter to the view we have taken, but these decisions turned on their own peculiar facts and are therefore clearly distinguishable and they do not lay down any rule of universal application.

24. For all these reasons, the appeal succeeds and is allowed. The judgment and order of the High Court quashing the impugned notification of the State Government dated December 20, 1978 making ad hoc promotions of the appellants and respondents Nos. 5-24 are set aside. Instead, we direct that the impugned order of the State Government making ad hoc promotions of 62 Assistant Engineers including the appellants and respondents Nos. 5-24 as officiating Executive Engineers will stand and they shall continue to function as such, subject to the terms and conditions contained in the aforesaid order till the process of making appointments by promotion to these posts is completed. We hope and trust that the State Government will strike a just balance between the competing claims of these 62 Assistant Engineers promoted as Executive Engineers on ad hoc basis, and persons like respondents Nos. 1 and 2 appointed as Temporary Engineers on an ad hoc basis who could at the most claim that they should be given the benefit of the period of service from April 21, 1975 when they were recruited as Assistant Engineers through the Public Service Commission, provided they satisfy the test of eligibitity of 8 years' experience in that class of service, while considering the case of all eligible members of Class II Service for promotion to the post of Executive Engineer in Class I Service in accordance with law and will complete the process of appointment within six months from today.

25. There shall be no order as to costs.

Appeal allowed.

Report No 108, P. 22

IT IS THEESSENCE OF DEMOCRACY
TO OBEY
NO MASTER BUT THE LAW

ACC No. [illegible] 4807

ಗ್ರಂಥಾಲಯ
ಲಾಲ್‌ಭಾಗ್, ಬೆಂಗಳೂರು

ಡಾ॥ ಎಂ.ಹೆಚ್.ಮರೀಗೌಡ ರಾಷ್ಟ್ರೀಯ ಗ್ರಂಥಾಲಯ
ಲಾಲ್‌ಬಾಗ್, ಬೆಂಗಳೂರು - 560 004

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